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25-49
No. 12030

United States
Court of Appeals
for the Ninth Circuit

EWELL TOOBERT,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellee.

Transcript of Record

Appeal from the District Court of the United States
for the Southern District of California,
Central Division

OCT 27 1948

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

GEORGE W. DOWNING, JR.,
650 S. Grand Ave.,
Los Angeles 14, Calif.

For Appellee:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
1206 Santee St.,
Los Angeles 15, Calif. [1*]

* Page numbering appearing at foot of page of original
certified Transcript of Record.

In the District Court of the United States for the
Southern District of California,
Central Division

No. 7824-BH

TIGHE E. WOODS, Acting Housing Expediter,
Office of the Housing Expediter,
Plaintiff,

vs.

EWELL TOOBERT, JACK HAMMOND and
WILLIAM H. HALL, DOE I and DOE II,
Defendants.

FIRST AMENDED COMPLAINT FOR RESTI-
TUTION AND INJUNCTION

FOR A FIRST CAUSE OF ACTION

I.

Plaintiff as Acting Housing Expediter, Office of the Housing Expediter, brings this cause of action for restitution pursuant to Section 205(a) to enforce compliance with Section 4 of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq.; and the Rent Regulations (10 Fed. Reg. 13528) issued by the Administrator pursuant to Section 2 of the Emergency Price Control Act of 1942, as amended, and/or brings this cause of action pursuant to Sec. 206 of the Housing and Rent Act of 1947, the Rent Regulations issued pursuant thereto.

II.

Jurisdiction of this cause of action is conferred upon this Court by Sections 205(c) of the Emergency Price Control Act of 1942, as amended, [2] and/or Section 206 of the Housing and Rent Act of 1947.

III.

At all times mentioned herein, up to and including June 30, 1947, there was in effect a Rent Regulation for Housing issued pursuant to Section 2(b) of the Emergency Price Control Act of 1942, as amended, for the Los Angeles Defense Rental Area, and/or on and since July 1, 1947 the housing accommodations herein described have been subject to maximum rents authorized and established by the Housing and Rent Act of 1947, and rent regulations issued pursuant thereto.

IV.

That the defendants, Doe I and Doe II, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

V.

That the defendant is a resident of the City of Los Angeles, County of Los Angeles, State of Cali-

fornia, in the Southern District of California, in the Central Division thereof, and within the jurisdiction of this Court.

VI.

During all times herein mentioned defendant has received rent for the use and occupancy of those certain housing accommodations, subject to said Acts and Regulations within said Defense Rental Area, known and described as 422, 422 $\frac{1}{4}$, 422 $\frac{3}{4}$ and 424 East 15th Street, Los Angeles, California.

VII.

Defendant received from persons for the use and occupancy of the hereinafter described accommodations rents in excess of the maximum rents established by said Rent Regulations; that there is attached hereto and by [3] reference made a part hereof, as though fully set out herein, a statement of the names of the persons overcharged, the period of occupancy of such persons, the maximum rent, the rent received from said persons, and the amount of overcharges.

FOR A SECOND CAUSE OF ACTION

I.

Plaintiff re-alleges and incorporates herein Paragraphs I, II, III, IV, V, VI and VII of his first cause of action as though set out in full herein.

II.

In the judgment of the Housing Expediter, Office of the Housing Expediter, said defendants have

engaged in acts and practices in violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., and/or in violation of Section 206(a) of the Rent and Housing Act of 1947, which acts and practices consist of violations of Rent Regulations for Housing (10 Fed. Reg. 13528) issued in accordance with Section 2(b) of the Emergency Price Control Act of 1942, as amended, and/or the Housing Regulation issued pursuant to the Housing and Rent Act of 1947, and therefore the Housing Expediter brings this cause of action pursuant to the provisions of Section 206 of the Housing and Rent Act of 1947. Jurisdiction of this cause is conferred by Section 206 of the Housing and Rent Act of 1947.

Wherefore, the plaintiff demands:

A. That the defendant be ordered and directed to tender to all available tenants as are entitled thereto a refund of all amounts in excess of the maximum rents established by the Emergency Price Control Act of 1942, as amended, and Regulations issued thereunder, and/or the Housing and Rent Act of 1947, and Regulations issued thereunder, which were received by the defendant, his agents, servants, employees and attorneys from said persons as rent for the use and occupancy of the housing accommodations described in the complaint, since the date maximum rents were established therefor by [4] said Acts and said Regulations.

B. A preliminary and final injunction enjoining the defendants, their agents, servants, employ-

ees, and all persons in active concert or participation with them from directly or indirectly demanding or receiving for accommodations subject to the Rent Regulations issued pursuant to the Housing and Rent Act of 1947, rents in excess of the maximum rents permitted under the Rent Regulations issued pursuant to the Housing and Rent Act of 1947.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ ABE I. LEVY,
Attorneys for Plaintiff. [5]

Housing accommodations located at 422, 422¹/₄, 422³/₄ and 424 East 15th Street, Los Angeles, California.

| Unit | Name of Tenant | Period of Overcharges | Amount Rent Paid | Maximum Legal Rent | Amount of Overcharges |
|---------------------------------|-----------------------------|-----------------------|------------------|--------------------|-----------------------|
| 422 | Ida Mae Patrick..... | 10/26/45- 8/26/47 | \$40.00 Mo. | \$18.00 Mo. | \$462.00 |
| 422 | Ida Mae Patrick..... | 9/26/47-12/26/47 | 20.00 Mo. | 18.00 Mo. | 6.00 |
| 422 ¹ / ₄ | Jeffery Gasaway..... | 9/13/45- 4/ 7/46 | 40.00 Mo. | 18.00 Mo. | 154.00 |
| 422 ¹ / ₄ | Pearl Hildreth..... | 4/ 7/46- 7/ 9/47 | 40.00 Mo. | 18.00 Mo. | 330.00 |
| 422 ¹ / ₄ | Pearl Hildreth..... | 7/10/47- 1/10/48 | 20.00 Mo. | 18.00 Mo. | 12.00 |
| 422 ¹ / ₄ | Ernestine Coleman..... | 7/13/45- 9/13/45 | 42.00 Mo. | 18.00 Mo. | 72.00 |
| 422 ³ / ₄ | Ernestine Coleman..... | 9/14/45- 7/14/47 | 40.00 Mo. | 18.00 Mo. | 462.00 |
| 422 ³ / ₄ | Ernestine Coleman..... | 7/14/47- 1/14/48 | 20.00 Mo. | 18.00 Mo. | 12.00 |
| 424 | Upper Berdie Mae White..... | 10/ 7/46-11/ 7/46 | 40.00 Mo. | 16.00 Mo. | 24.00 |
| | Front..... | 11/ 7/46- 8/ 7/47 | 40.00 Mo. | 16.00 Mo. | 216.00 |
| 424 | Upper Ethel Davis..... | 1/16/46- 8/16/47 | 40.00 Mo. | 12.00 Mo. | 504.00 |
| | Rear | | | | |
| Total..... | | | | | \$2,254.00 |

Statement referred to in Paragraph VII of Plaintiff's First Cause of Action.

[Endorsed]: Filed Dec. 17, 1947.

Tighe E. Woods

[Title of District Court and Cause.]

ANSWER OF THE DEFENDANT EWELL
TOOBERT TO FIRST AMENDED
COMPLAINT

Comes now the defendant Ewell Toobert and for himself alone, in answer to the first cause of action of plaintiff's amended complaint, admits, denies and alleges as follows:

I.

This defendant denies the allegations of paragraphs I and II of said first cause of action.

II.

This defendant denies each and all the allegations of paragraphs VI and VII of said first cause of action; in this connection this defendant denies that he has received all or any part whatsoever of the alleged rent referred to in said paragraph VII and in the itemized statement referred to therein as having been paid to this defendant and this defendant further denies that he has received all or any part whatsoever of the [7] alleged rent or overcharges set forth in the itemized statement referred to in said paragraph VII and attached to said complaint.

In answer to the second cause of action of plaintiff's amended complaint this defendant admits, denies and alleges as follows:

I.

This defendant repeats and incorporates herein the denials contained in paragraphs I and II of his foregoing answer to the first cause of action of

plaintiff's amended complaint to the same extent as if said denials were set out in full herein.

II.

Denies that this defendant has ever engaged in any act or practice in violation of Section 4(a) or any other provisions of the Emergency Price Control Act of 1942, as amended or otherwise and/or in violation of Section 206(a) or any other provisions of the Rent and Housing Act of 1947 and/or any Rent Regulations issued in accordance with or pursuant to either of said Acts.

Further answering Plaintiff's amended complaint and as a separate and affirmative answer and defense to said complaint and to each of the causes of action therein contained this defendant alleges as follows:

I.

That each and all of the alleged overcharges or moneys paid in excess of the maximum legal rent to this defendant, if any such there ever were, were paid prior to December 4, 1946, and were paid more than one year before the commencement of this action.

Further answering said amended complaint and as a separate and affirmative answer and defense [8] to said amended complaint and to each of the causes of action therein contained this defendant alleges as follows:

I.

That any action against him on the part of this suing plaintiff for any alleged overcharges of rental

collected on the premises described in the complaint is barred by the provisions of Section 205(e) of the Emergency Price Control Act of 1942, and the Rent and Housing Act of 1947.

Further answering said amended complaint and as a separate, affirmative answer and defense to said amended complaint and to each of the causes of action therein contained this defendant alleges as follows:

I.

That each and all of the alleged overcharges or moneys paid in excess of the maximum legal rent to this defendant, if any such there were, were paid prior to December 17, 1946, and were paid more than one year before the commencement of this action.

Further answering said amended complaint and as a separate, affirmative answer and defense to said amended complaint and to each of the causes of action therein contained this defendant alleges as follows:

I.

As to each and all of the alleged payments of rent in excess of the maximum legal rent alleged in paragraph VII of said Amended Complaint and the statement attached thereto which were made more than one year prior to the commencement of this [9] action, this defendant alleges that because the same were made more than one year before the commencement of this action that recovery thereof or

any recovery based thereon is barred by the statute of limitations.

Wherefore, this defendant prays that plaintiff take nothing against him and that he have judgment for his costs incurred herein.

/s/ GEORGE W. DOWNING, JR.,
Attorney for Defendant
Ewell Toobert.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Jan. 17, 1947. [10]

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS
PURSUANT TO RULE 36

Plaintiff, pursuant to Rule 36 of the Federal Rules of Civil Procedure, requests the defendants, Ewell Toobert, Jack Hammond and William H. Hall, within ten (10) days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That, at all times material to this action, the defendant Ewell Toobert was the landlord of the housing accommodations located at 422, 422 $\frac{1}{4}$, 422 $\frac{3}{4}$ and 424 East 15th Street, City of Los Angeles, County of Los Angeles, State of California.

2. That, at all times material to this action, the defendant Jack Hammond acted in the capacity of agent for the defendant Ewell Toobert.

3. That, during all or part of the time material to this action, the defendant William H. Hall acted in the capacity of agent for the defendant Ewell Toobert.

4. That the said premises are within the Los Angeles Defense [12] Rental Area.

5. That said premises, at all times material to this action, are and were subject to the Rent Regulation for Housing, as amended, (10 F. R. 13528).

6. That jurisdiction of this action is conferred upon this Court by Section 205(c) of the Emergency Price Control Act of 1942, as amended, (Pub. Law 421, 77th Cong. 2nd Sess. 56 Stat. 23, 50 USCA App. 901 et seq.), and Section 206 of the Housing and Rent Act of 1947.

7. That on or about November 1, 1942, certificates of registration of rental units located at 422, 422 $\frac{1}{4}$, 422 $\frac{3}{4}$ and 424 Upper Front and Upper Rear, East 15th Street, City of Los Angeles, State of California, were filed with the Office of Price Administration. A copy of each Certificate of registration is attached hereto, marked Exhibits "A", "B", "C", "D" and "E". The original of each of said certificates of registration is on file with the Rent Litigation Unit of the Office of Rent Control, Office of the Housing Expediter, and is available for examination by the defendant or his attorney.

8. That the attached Exhibits "A", "B", "C", "D" and "E" are true copies, in words, figures and substance, of said certificates.

9. That the certificates, of which attached Exhibits "A", "B", "C", "D" and "E" are true copies, are genuine.

10. That said certificates establish the maximum rent, *prima facie*, for the housing accommodations herein described, for all times material to this suit.

11. That said certificates of registration are official records of the Office of Rent Control.

12. That one, Ida Mae Patrick, used and occupied the housing accommodation located at 422 East 15th Street, Los Angeles, California, for the period commencing October 26, 1945 and ending August 26, 1947.

13. That defendant, Ewell Toobert, either personally or through his agents, Jack Hammond and/or William H. Hall, demanded and received from said Ida Mae Patrick, as rent for the use and occupancy of the housing [13] accommodations located at 422 East 15th Street, City of Los Angeles, State of California, the sum of \$40.00 for each month during the period commencing October 26, 1945 and ending August 26, 1947.

14. That one, Ida Mae Patrick, used and occupied the housing accommodations located at 422 East 15th Street, City of Los Angeles, State of California, for the period commencing September 26, 1947, and ending December 26, 1947.

15. That defendant, Ewell Toobert, either personally or through his agents, Jack Hammond and/or William H. Hall, demanded and received from said Ida Mae Patrick, as rent for the use and occupancy of said housing accommodation located at 422 East 15th Street, City of Los Angeles, State of California, the sum of \$20.00 for each month during the period commencing September 26, 1947 and ending December 26, 1947.

16. That one, Jeffrey Gasaway, used and occupied the housing accommodation located at 422 $\frac{1}{4}$ East 15th Street, City of Los Angeles, State of California, for the period commencing September 13, 1945 and ending April 7, 1946.

17. That defendant, Ewell Toobert, either personally or through his agents, Jack Hammond and/or William H. Hall, demanded and received from said Jeffrey Gasaway, as rent for the use and occupancy of said housing accommodations located at 422 $\frac{1}{4}$ East 15th Street, City of Los Angeles, State of California, the sum of \$40.00 for each month during the period commencing September 15, 1945 and ending April 7, 1946.

18. That one, Pearl Hildreth, used and occupied the housing accommodation located at 422 $\frac{1}{4}$ East 15th Street, City of Los Angeles, State of California, for the period commencing April 7, 1946, and ending July 9, 1947.

19. That defendant, Ewell Toobert, either personally or through his agents, Jack Hammond and/or William H. Hall, demanded and received from said Pearl Hildreth, as rent for the use and occupancy of said housing accommodation located at 422 $\frac{1}{4}$ East 15th Street, City of Los Angeles, State of California, the sum of \$40.00 for each month during the period [14] commencing April 7, 1946 and ending July 9, 1947.

20. That one, Pearl Hildreth, used and occupied the housing accommodation located at 422 $\frac{1}{4}$ East 15th Street, City of Los Angeles, State of California, for the period commencing July 10, 1947 and ending January 10, 1948.

21. That defendant, Ewell Toobert, either personally or through his agents, Jack Hammond and/or William H. Hall, demanded and received from said Pearl Hildreth, as rent for the use and occupancy of said housing accommodation located at 4221½ East 15th Street, City of Los Angeles, State of California, the sum of \$20.00 for each month during the period commencing July 10, 1947 and ending January 10, 1948.

22. That one, Ernestine Coleman, used and occupied the housing accommodation located at 4221¼ East 15th Street, City of Los Angeles, State of California, for the period commencing July 13, 1945 and ending September 13, 1945.

23. That defendant, Ewell Toobert, either personally or through his agents, Jack Hammond and/or William H. Hall, demanded and received from said Ernestine Coleman, as rent for the use and occupancy of said housing accommodation located at 4221¼ East 15th Street, City of Los Angeles, State of California, the sum of \$42.00 for each month during the period commencing July 13, 1945 and ending September 13, 1945.

24. That one, Ernestine Coleman, used and occupied the housing accommodation located at 4223¼ East 15th Street, City of Los Angeles, State of California, for the period commencing September 14, 1945, and ending July 14, 1947.

25. That defendant, Ewell Toobert, either personally or through his agents, Jack Hammond and/or William H. Hall, demanded and received from said Ernestine Coleman, as rent for the use and occupancy of said housing accommodation located at 4223¼ East 15th Street, City of Los An-

geles, State of California, the sum of \$40.00 for each month during the period commencing September 14, 1945 and ending July 14, 1947.

26. That one, Ernestine Coleman, used and occupied the housing [15] accommodation located at 422 $\frac{3}{4}$ East 15th Street, City of Los Angeles, State of California, for the period commencing July 14, 1947 and ending January 14, 1948.

27. That defendant, Ewell Toobert, either personally or through his agents, Jack Hammond and/or William H. Hall, demanded and received from said Ernestine Coleman, as rent for the use and occupancy of said housing accommodation located at 422 $\frac{3}{4}$ Est 15th Street, City of Los Angeles, State of California, the sum of \$20.00 for each month during the period commencing July 14, 1947 and ending January 14, 1948.

28. That one, Birdie Mae White, used and occupied the housing accommodation located at 424 East 15th Street, 2nd Floor Front, in the City of Los Angeles, State of California, for the period commencing October 7, 1946 and ending August 7, 1947.

29. That defendant, Ewell Toobert, either personally or through his agents, Jack Hammond and/or William H. Hall, demanded and received from said Birdie Mae White, as rent for the use and occupancy of said housing accommodation located at 424 East 15th Street, 2nd Floor Front, in the City of Los Angeles, State of California, the sum of \$40.00 for each month during the period commencing October 7, 1946 and ending August 7, 1947.

30. That one, Ethel Davis, used and occupied the housing accommodation located at 424 East 15th Street, 2nd Floor Rear, in the City of Los Angeles, State of California for the period commencing January 16, 1946, and ending August 16, 1947.

31. That defendant, Ewell Toobert, either personally or through his agents, Jack Hammond and/or William H. Hall, demanded and received from said Ethel Davis, as rent for the use and occupancy of said Ethel Davis, as rent for the use and occupancy of said housing accommodation located at 424 East 15th Street, 2nd Floor Rear, in the City of Los Angeles, State of California, the sum of \$40.00 for each month during the period commencing January 16, 1946 and ending August 16, 1947.

32. That as of the date of filing this suit more than 30 days had elapsed since the demand and receipt of rent and the tenants above [16] named have not instituted any action against the defendants pursuant to Section 205(e) of the Emergency Price Control Act of 1942, as amended, prior to the institution of this suit.

Dated: Los Angeles, California, this 18th day of February, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
ASHER SCHEIR,

By /s/ ASHER SCHEIR.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 19, 1948. [17]

[Title of District Court and Cause.]

DEFENDANT'S STATEMENT IN REPLY TO
PLAINTIFF'S REQUEST FOR ADMISSIONS

Comes now the defendant Ewell Toobert and for himself alone and not for any of his co-defendants, makes the following answer and reply containing both admissions, statements and denials to the Plaintiff's Request for Admissions Pursuant to Rule 36 heretofore served on this defendant:

1. Denies that, at all times material to this action or at any time or at all, the defendant Ewell Toobert was the landlord of the housing accommodations located at 422, 422 $\frac{1}{4}$, 422 $\frac{3}{4}$ and 424 East 15th Street, City of Los Angeles, County of Los Angeles, State of California, or of either or any of the above described premises.

2. Denies that, at all times material to this action or at any other time or at all, the defendant Jack Hammond acted in the [24] capacity of agent for the defendant Ewell Toobert.

3. Denies that, during all or part of the time material to this action or at any other time or at all, the defendant William H. Hall acted in the capacity of agent for the defendant Ewell Toobert.

4. ———

5. ———

6. Denies that jurisdiction of this action is conferred upon this Court by Section 205(c) of the Emergency Price Control Act of 1942, as amended,

and/or Section 206 of the Housing and Rent Act of 1947 or by any other statute or at all.

7. —
8. —
9. —
10. —
11. —

This defendant is not and never was the landlord of any of the premises referred to in plaintiff's aforesaid request, and this defendant does not have and never has had any knowledge or information whatsoever of or concerning the occupants of said premises or any of them at any time whatsoever and this defendant is therefore wholly unable to admit or deny the truth of the allegations contained in that portion of plaintiff's aforesaid request designated as paragraphs Nos. 12, 14, 16, 18, 20, 22, 24, 26, 28 and 30.

13. Denies that this defendant, either personally or through his purported agents, Jack Hammond and/or William H. Hall, or either of them, demanded and/or received from Ida Mae Patrick, or any other person, as rent for the use and/or occupancy of the housing accommodation located at 422 East 15th Street, City of Los Angeles, State of California, or any other premises, the sum of \$40.00 or any other sum, for each month or for any period [25] during the period commencing October 26, 1945, and ending August 26, 1947, or any other period or at all.

15. Denies that this defendant, either personally or through his purported agents, Jack Hammond and/or William H. Hall, or either of them,

demanded and/or received from Ida Mae Patrick, or any other person, as rent for the use and/or occupancy of the housing accommodation located at 422 East 15th Street, City of Los Angeles, State of California, or any other premises, the sum of \$20.00 or any other sum, for each month or for any period during the period commencing September 26, 1947, and ending December 26, 1947.

17. Denies that this defendant, either personally or through his purported agents, Jack Hammond and/or William H. Hall, or either of them, demanded and/or received from Jeffrey Gasaway, or any other person, as rent for the use and/or occupancy of the housing accommodation located at 422 $\frac{1}{4}$ East 15th Street, City of Los Angeles, State of California, or any other premises, the sum of \$40.00 or any other sum, for each month or for any period during the period commencing September 13, 1945 and ending April 7, 1946.

19. Denies that this defendant, either personally or through his purported agents, Jack Hammond and/or William H. Hall, or either of them, demanded and/or received from Pearl Hildreth, or any other person, as rent for the use and/or occupancy of the housing accommodation located at 422 $\frac{1}{4}$ East 15th Street, City of Los Angeles, State of California, or any other premises, the sum of \$40.00 or any other sum, for each month or for any period during the period commencing April 7, 1946 and ending July 9, 1947.

21. Denies that this defendant, either personally or through his purported agents, Jack Hammond and/or William H. Hall, or either of them, de-

manded and/or received from Pearl Hildreth, or any other person, as rent for the use and/or occupancy of the [26] housing accommodation located at 4221½ East 15th Street, City of Los Angeles, State of California, or any other premises, the sum of \$20.00 or any other sum, for each month or for any period during the period commencing July 10, 1947, and ending January 10, 1948.

23. Denies that this defendant, either personally or through his purported agents, Jack Hammond and/or William H. Hall, or either of them, demanded and/or received from Ernestine Coleman, or any other person, as rent for the use and/or occupancy of the housing accommodation located at 4221¼ East 15th Street, City of Los Angeles, State of California, or any other premises, the sum of \$42.00 or any other sum, for each month or for any period during the period commencing July 13, 1945, and ending September 13, 1945.

25. Denies that this defendant, either personally or through his purported agents, Jack Hammond and/or William H. Hall, or either of them, demanded and/or received from Ernestine Coleman, or any other person, as rent for the use and/or occupancy of the housing accommodation located at 422¾ East 15th Street, City of Los Angeles, State of California, or any other premises, the sum of \$40.00 or any other sum, for each month or for any period during the period commencing September 14, 1945, and ending July 14, 1947.

27. Denies that this defendant, either personally or through his purported agents, Jack Ham-

mond and/or William H. Hall, or either of them, demanded and/or received from Ernestine Coleman, or any other person, as rent for the use and/or occupancy of the housing accommodation located at 422 $\frac{3}{4}$ East 15th Street, City of Los Angeles, State of California, or any other premises, the sum of \$20.00, or any other sum, for each month or for any period during the period commencing July 14, 1947, and ending January 14, 1948. [27]

29. Denies that this defendant, either personally or through his purported agents, Jack Hammond and/or William H. Hall, or either of them, demanded and/or received from Birdie Mae White, or any other person, as rent for the use and/or occupancy of the housing accommodation located at 424 East 15th Street, 2nd Floor Front, in the City of Los Angeles, State of California, or any other premises, the sum of \$40.00 or any other sum, for each month or for any period during the period commencing October 7, 1946 and ending August 7, 1947.

31. Denies that this defendant, either personally or through his purported agents, Jack Hammond and/or William H. Hall, or either of them, demanded and/or received from Ethel Davis, or any other person, as rent for the use and/or occupancy of the housing accommodation located at 424 East 15th Street, 2nd Floor Rear, in the City of Los Angeles, State of California, or any other premises, the sum of \$40.00, or any other sum, for each month or for any period during the period commencing January 16, 1946 and ending August 16, 1947.

This defendant here specifically alleges that at no time did he ever, either personally or through any agent whomsoever, collect or receive any rent whatsoever from any person whomsoever covering any of the premises referred to in plaintiff's aforesaid request at any period of time whatsoever.

32. Denies that as of the date of filing this suit or any other time, more than thirty days or any other period has elapsed since the alleged demand and/or receipt of rent on the part of this defendant for the reason that this defendant has never demanded or received any such rent.

Dated at Los Angeles, California, this 27th day of February, 1948.

/s/ EWELL TOOBERT,
Defendant.

/s/ GEORGE W. DOWNING, JR.,
Attorney for Defendant,
Ewell Toobert.

(Duly Verified.)

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Mar. 1, 1948. [28]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Plaintiff having filed his first amended complaint, and the defendants, Ewell Toobert and Jack Hammond, having filed their answer thereto, and the matter having come on for trial on the 22nd

and 23rd days of March, 1948, before the Honorable Charles C. Cavanah, presiding without a jury, a jury having been waived by the parties herein, and the plaintiff being represented by Frank L. Hirst, Esq., and said defendant, Ewell Toobert, being represented by George W. Downing, Jr., Esq., and the defendant, Jack Hammond, being represented by Harold J. Sinclair, Esq., and the defendant, William H. Hall, being represented by Ivan J. Johnson, Esq., and both oral and documentary evidence having been introduced, and the court having made its [30] order dismissing said action as to defendant, William H. Hall, and being fully advised in the premises, the court now makes the following

FINDINGS OF FACT

1. That the plaintiff as Housing Expediter, Office of the Housing Expediter, is the proper party plaintiff duly authorized to bring this action under and pursuant to the Emergency Price Control Act of 1942, as amended, and the Housing and Rent Act of 1947, as amended.

2. That this court has jurisdiction of the defendants, Ewell Toobert and Jack Hammond, and of the subject matter of this action.

3. That at all times pertinent to this action the Rent Regulation for Housing, issued pursuant to Section 2(a) of the Emergency Price Control Act of 1942, and the Controlled Rent Regulation for Housing, issued pursuant to the Housing and Rent Act of 1947, as amended, were in full force and effect in the Los Angeles Defense Rental Area.

4. That said defendants, Ewell Toobert and Jack Hammond, at all times pertinent to this action were residents of the City of Los Angeles, County of Los Angeles, State of California.

5. That for the period of time extending from July 13, 1945, to and including September 1, 1947, said defendants, Ewell Toobert and Jack Hammond, were the landlords within the meaning of said term as defined in Section 13(a)(8) of the Rent Regulation for Housing, and Section 1 of the Controlled Housing Rent Regulation, of the housing accommodations designated as 422, 422 $\frac{1}{4}$, 422 $\frac{3}{4}$, 424 upper front and 424 upper rear, East 15th Street, Los Angeles, California, and located within said Defense Rental Area, said accommodations being subject to said [31] Rent Regulation for Housing and said Controlled Housing and Rent Regulation.

6. That for the period extending from September 1, 1947, to January 14, 1948, said defendant, Jack Hammond, was the landlord of said housing accommodations referred to in Paragraph 5, immediately above.

7. That for the period extending from October 26, 1945, to August 26, 1947, exclusive of the period extending from July 1, 1946, to July 26, 1946, inclusive, defendants Ewell Toobert and Jack Hammond, as landlords, demanded and received from Ida Mae Patrick the sum of \$40.00 per month as rent for the use and occupancy of said housing accommodations located at 422 East 15th Street, Los Angeles, California; whereas, the maximum legal rent for said housing accommodations was the

sum of \$18.00 per month, amounting to a total overcharge of \$462.00.

8. That for the period extending from September 26, 1947, to December 26, 1947, said defendant, Jack Hammond, as landlord demanded and received from Ida Mae Patrick the sum of \$20.00 per month as rent for the use and occupancy of said housing accommodations located at 422 East 15th Street, Los Angeles, California; whereas; the maximum legal rent for said housing accommodations was the sum of \$18.00 per month, amounting to an overcharge of \$6.00.

9. That for the period extending from September 21, 1945, to April 10, 1946, defendants Ewell Toobert and Jack Hammond, as landlords, demanded and received from Jeffery Gasaway the sum of \$40.00 per month as rent for the use and occupancy of said housing accommodations located at 422 $\frac{1}{4}$ East 15th Street, Los Angeles, California; whereas, the maximum legal rent for said housing accommodations was the sum of \$18.00 per month, amounting to a total overcharge of \$132.00.

10. That for the period extending from April 10, 1946, to [32] July 9, 1947, exclusive of the period extending from July 1, 1946, to July 26, 1946, inclusive, defendants Ewell Toobert and Jack Hammond, as landlords, demanded and received from Pearl Hildreth the sum of \$40.00 per month as rent for the use and occupancy of said housing accommodations located at 422 $\frac{1}{4}$ East 15th Street, Los Angeles, California; whereas, the maximum legal rent for said housing accommodations was the

sum of \$18.00 per month, amounting to a total overcharge of \$330.00.

11. That for the period extending from July 10, 1947, to September 10, 1947, said defendants, Ewell Toobert and Jack Hammond, as landlords, demanded and received from Pearl Hildreth the sum of \$20.00 per month as rent for the use and occupancy of said housing accommodations located at 422 $\frac{1}{4}$ East 15th Street, Los Angeles, California; whereas, the maximum legal rent for said housing accommodations was the sum of \$18.00 per month, amounting to a total overcharge of \$4.00.

12. That for the period extending from September 10, 1947, to January 10, 1948, said defendant Jack Hammond, as landlord, demanded and received from Pearl Hildreth the sum of \$20.00 per month as rent for the use and occupancy of said housing accommodations located at 422 $\frac{1}{4}$ East 15th Street, Los Angeles, California; whereas the maximum legal rent for said housing accommodations was the sum of \$18.00 per month, amounting to a total overcharge of \$8.00.

13. That for the period extending from July 13, 1945, to September 13, 1945, said defendants, Ewell Toobert and Jack Hammond, demanded and received from Ernestine Coleman the sum of \$42.00 per month as rent for the use and occupancy of said housing accommodations located at 422 $\frac{1}{4}$ East 15th Street, Los Angeles, California; whereas the maximum legal rent for said housing accommodations was the sum of \$18.00 per month, amounting to a total overcharge of \$48.00. [33]

14. That for the period extending from September 14, 1945, to July 14, 1947, exclusive of the period extending from July 1, 1946, to July 26, 1946, inclusive, said defendants, Ewell Toobert and Jack Hammond, as landlords, demanded and received from Ernestine Coleman the sum of \$40.00 per month as rent for the use and occupancy of said housing accommodations located at 422 $\frac{3}{4}$ East 15th Street, Los Angeles, California; whereas, the maximum legal rent for said housing accommodations was the sum of \$18.00 per month, amounting to a total overcharge of \$462.00.

15. That for the period extending from July 14, 1947, to September 14, 1947, said defendants, Ewell Toobert and Jack Hammond, as landlords, demanded and received from Ernestine Coleman the sum of \$20.00 per month as rent for the use and occupancy of said housing accommodations located at 422 $\frac{3}{4}$ East 15th Street, Los Angeles, California; whereas, the maximum legal rent for said housing accommodations was the sum of \$18.00 per month, amounting to a total overcharge of \$4.00.

16. That for the period extending from September 14, 1947, to January 14, 1948, said defendants, Jack Hammond, as landlord, demanded and received from Ernestine Coleman the sum of \$20.00 per month for the use and occupancy of said housing accommodations located at 422 $\frac{3}{4}$ East 15th Street, Los Angeles, California; whereas, the maximum legal rent for said housing accommodations was the sum of \$18.00 per month, amounting to a total overcharge of \$8.00.

17. That for the period extending from October

7, 1946, to August 7, 1947, said defendants, Ewell Toobert and Jack Hammond, demanded and received from Berdie Mae White the sum of \$40.00 per month as rent for the use and occupancy of said housing accommodations located at 424 (upper front) East 15th Street, Los Angeles, California; whereas, the maximum legal rent for said housing accommodations was the sum of \$16.00 per month, [34] amounting to a total overcharge of \$240.00.

18. That for the period extending from January 16, 1946, to August 16, 1947, excluding the period extending from July 1, 1946, to July 26, 1946, inclusive, the defendants Ewell Toobert and Jack Hammond, as landlords, demanded and received from Ethel Davis the sum of \$40.00 per month as rent for the use and occupancy of said housing accommodations located at 424 (upper rear) East 15th Street, Los Angeles, California; whereas, the maximum legal rent for said housing accommodations was the sum of \$12.00 per month, amounting to a total overcharge of \$504.00.

From the above findings of fact the Court makes the following

CONCLUSIONS OF LAW

1. That the defendants Ewell Toobert and Jack Hammond violated Section 2(a) of the Rent Regulation for Housing, and Section 2(a) of the Controlled Housing Rent Regulation, and therefore have violated the provisions of the Emergency Price Control Act of 1942, and the Housing and Rent Act of 1947, as amended.

2. That said tenants referred to in Paragraph 7 to Paragraph 18, inclusive, are entitled to re-

funds in the amounts of the overcharges specified in said paragraphs. That the total amount of said refund is the sum of \$2008.00.

3. That said defendants, Ewell Toobert and Jack Hammond, are liable jointly and severally for the refunds of overcharges specified in Paragraphs 7, 9, 10, 11, 13, 14, 15, 17, and 18, of the above findings of fact; and the defendant, Jack Hammond, is liable individually for the refunds of overcharges specified in Paragraphs 8, 12 and 16, of the above findings of fact.

Dated this 7th day of April, 1948.

/s/ CHARLES C. CAVANAH

Judge, United States District Court. [35]

The foregoing Findings of Fact and Conclusions of Law are approved as to form:

ABE I. LEVY,

STEPHEN D. MONAHAN,

FRANK L. HIRST,

By /s/ FRANK L. HIRST,

Attorneys for Plaintiff.

GEORGE W. DOWNING, JR.,

Attorney for defendant,

Ewell Toobert.

HAROLD J. SINCLAIR,

Attorney for Defendant,

Jack Hammond.

/s/ IVAN J. JOHNSON,

Attorney for Defendant,

William H. Hall.

(Acknowledgment of Service.)

[Endorsed]: Filed April 7, 1948.

[36]

In the District Court of the United States,
Southern District of California,
Central Division

No. 7824-BH

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

EWELL TOOBERT, JACK HAMMOND, and
WILLIAM H. HALL, DOE I and DOE II,
Defendants,

JUDGMENT

The above entitled cause having come on for trial on the 22nd and 23rd days of March, 1948, before the Honorable Charles C. Cavanah, Judge presiding without a jury, a jury having been expressly waived, the plaintiff being represented by Frank L. Hirst, Esq., and the defendant, Ewell Toobert, being represented by George W. Downing, Jr., Esq., and the defendant, Jack Hammond, being represented by Harold J. Sinclair, Esq., and the defendant, William H. Hall, being represented by Ivan J. Johnson, Esq., and an Order having been made pursuant to stipulation of the parties hereto substituting Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, as plaintiff herein in place and stead of Tighe E. Woods, Acting Housing Expediter, Office of the Housing Expediter, and both oral and documentary evidence having been [37] introduced and the Court having

made its findings of fact and conclusions of law, and sufficient reasons appearing therefore,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the defendants, Ewell Toobert and Jack Hammond, and each of them, shall refund to the following named persons in the amounts indicated opposite their respective names:

| | |
|-------------------|----------|
| Ida Mae Patrick | \$462.00 |
| Jeffery Gasaway | 132.00 |
| Pearl Hildreth | 334.00 |
| Ernestine Coleman | 514.00 |
| Berdie Mae White | 240.00 |
| Ethel Davis | 504.00 |

2. That the defendant, Jack Hammond, shall refund to the following named persons in the amounts indicated opposite their respective names:

| | |
|-------------------|--------|
| Ida Mae Patrick | \$6.00 |
| Pearl Hildreth | 8.00 |
| Ernestine Coleman | 8.00 |

3. That said refunds referred to in Paragraphs 1 and 2, immediately above, shall be accomplished by the defendants delivering to the Office of the Housing Expediter, bank money orders, or certified or cashiers checks, in said specified amounts for transmittal to said persons entitled to said refunds.

4. That the Second Cause of Action of plaintiff's Complaint be and the same is hereby dismissed.

5. That plaintiff's Complaint be dismissed as to Defendants Doe I and Doe II.

6. That the above entitled action be and the same is hereby dismissed as to defendant, William H. Hall, with prejudice.

Dated this 7th day of April, 1948.

/s/ CHARLES C. CAVANAH,
Judge, United States District Court. [38]

The foregoing Judgment is approved as to form:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

GEORGE W. DOWNING, JR.,
Attorney for Defendant,
Ewell Toobert.

HAROLD J. SINCLAIR,
Attorney for Defendant,
Jack Hammond.

/s/ IVAN J. JOHNSON,
Attorney for Defendant,
William H. Hall.

(Acknowledgment of Service.) [39]

[Endorsed]: Filed April 7, 1948.

United States District Court, Southern District of
California, Central Division

NOTICE BY CLERK OF ENTRY OF
JUDGMENT

Frank L. Hirst, Esq., Attorney at Law, Office
of Housing Expediter, 1206 Santee St., Los An-
geles 15, Calif.

George W. Downing, Jr., Esq., Attorney at Law,
650 So. Grand Ave., Los Angeles 14, Calif.

Harold J. Sinclair, Esq., Attorney at Law, 1105
East Vernon Ave., Los Angeles, Calif.

Ivan J. Johnson, III, Esq., Attorney at Law,
1105 East Vernon Ave., Los Angeles, Calif.

Re: 7824-BH Civ. Tighe E. Woods, etc. vs. Ewell
Toobert, Jack Hammond and William H. Hall.

You are hereby notified that Judgment has been
entered this day in the above-entitled case, in
Civil Order Book No. 50, page 71.

Dated Los Angeles, California, April 7, 1948.

EDMUND L. SMITH,

Clerk,

By /s/ MURRAY E. WIRE,

Deputy Clerk.

Findings of Fact and Conclusions of Law, filed
this day.

MEW.

[Endorsed]: Filed April 7, 1948.

[40]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant Ewell Toobert, and for himself alone, moves the court to vacate and set aside that judgment entered herein on April 7, 1948, in Book 50 at page 71, so far as said judgment runs against or contains any provisions requiring payment of money by this defendant, and to grant to this defendant a new trial of the above entitled action, on the following grounds, to-wit:

1. That the Court erred in making Finding of Fact No. 3, in that there is not sufficient evidence to support said finding as against this defendant;

2. That the Court erred in making Findings of Fact Nos. 7, 9, 10, 11, 13, 14, 15, 17 and 18 in that there is not sufficient evidence to support said findings or any of them, as against this defendant. [41]

3. That the decision of the court is contrary to law, in that there is not sufficient evidence to support any judgment against this defendant.

4. That the decision of the court is contrary to law, in that the court has made findings of fact which are unsupported by the evidence.

5. That the judgment is contrary to law, in that there is no evidence in the record before the court that the defendant Ewell Toobert was ever the landlord of said premises as to the tenants listed in the Findings of Fact, or that the defendant Ewell Toobert ever demanded or received any rent whatsoever from any of said tenants.

6. That the judgment is contrary to law, in that the law does not authorize a judgment against the landlord's lessor for rent overcharges by such landlord.

Dated April 15, 1948.

/s/ GEORGE W. DOWNING, JR.,
Attorney for Defendant,
Ewell Toobert.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 16, 1948.

[42]

[Title of District Court and Cause.]

ORDER DENYING MOTION OF DEFEN-
DANT EWELL TOOBERT FOR A
NEW TRIAL

The defendant, Ewell Toobert, having filed his motion to vacate and set aside the judgment heretofore entered in the above entitled action and to grant said defendant, Ewell Toobert, a new trial, and said motions having come on for hearing in the above entitled court before the Honorable Charles C. Cavanah on the 22nd day of April, 1948, plaintiff being represented by Frank L. Hirst, Esq., and said defendant, Ewell Toobert, being represented by George W. Downing, Jr., Esq., and oral argument having been presented on behalf of both the plaintiff and said defendant, and the Court being fully advised in the premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the motion of the defendant, Ewell Toobert, to vacate and set aside the judgment entered herein be and the same [44] is hereby denied.

2. That the motion of said defendant, Ewell Toobert, for a new trial be and the same is hereby denied.

Dated this 23rd day of April, 1948.

/s/ CHARLES C. CAVANAH,
Judge, United States District Court.

The foregoing Order is approved as to form:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

/s/ GEORGE W. DOWNING, JR.,
Attorney for Defendant,
Ewell Toobert.

[Endorsed]: Filed April 23, 1948. [45]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given that Ewell Toobert, one of the defendants in the above-entitled action, does hereby appeal to the Circuit Court of Appeals for

the Ninth Circuit from that certain judgment entered herein on April 7, 1948, in favor of Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, and against defendants Ewell Toobert and Jack Hammond, and from the whole of said judgment.

Dated June 4, 1948.

/s/ GEORGE W. DOWNING, JR.,
Attorney for Defendant,
Ewell Toobert.

[Endorsed]: Filed June 5, 1948.

[46]

[Title of District Court and Cause.]

STATEMENT ACCOMPANYING CASH
DEPOSIT IN LIEU OF UNDERTAKING
ON APPEAL

I, George W. Downing, Jr., residing at 1296 East Calaveras Street, Altadena, California, hereby deposit with the Clerk of the above-entitled court the sum of \$250.00, on behalf of the appellant Ewell Toobert herein, in lieu of the bond on appeal provided for under Rule 73(c) of the Rules of Civil Procedure.

I declare that I am the owner of said fund, and that it is deposited to take the place of such bond on appeal, and that said deposit secures the payment of costs awarded against the appellant Ewell Toobert if the appeal is dismissed or the judgment appealed from is affirmed, or such costs as the

appellate court may award if the judgment is modified.

Said fund is expressly subjected to all of the provisions of local rule 8(c) of said Court, and I expressly agree that in case of default or contumacy on the part of the appellant, the [47] Court may proceed summarily and execute upon said fund in accordance with the obligation of the appellant.

Dated June 5, 1948.

/s/ GEORGE W. DOWNING, JR.,
Attorney for Defendants.

State of California,
County of Los Angeles—ss.

On this 5th day of June, 1948, before me, B. Frank Hopkins, a Notary Public in and for the County of Los Angeles, State of California, personally appeared George W. Downing, Jr., known to me to be the person who subscribed the within instrument, and he acknowledged to me that he executed the same.

In Witness Whereof I have hereunto set my hand and seal the day and year in this certificate first above written.

(Seal) /s/ B. FRANK HOPKINS,
Notary Public in and for said County and State.

[Endorsed]: Filed June 5, 1948.

[48]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL AND
DOCKET ACTION

Good cause appearing from the affidavit of George W. Downing, Jr., made and filed herein,

It Is Hereby Ordered that the time for filing of the record on appeal with the Circuit Court of Appeals for the Ninth Circuit and for the docketing of this action in said Court be and it hereby is extended so that such record may be filed and such action may be docketed on or before August 4, 1948.

Dated July 8th, 1948.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed July 8, 1948.

[49]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL AND
DOCKET ACTION

Good cause appearing from the affidavit of George W. Downing, Jr., made and filed herein,

It Is Hereby Ordered that the time for filing of the record on appeal with the Circuit Court of

Appeals for the Ninth Circuit and for the docketing of this action in said Court be and it hereby is extended so that such record may be filed and such action may be docketed on or before September 2, 1948.

Dated July 20th, 1948.

/s/ PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed July 20, 1948.

[50]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY
ON APPEAL

Comes now the appellant Ewell Toobert, and hereby states that he intends to and will rely on the following points on appeal:

1. That the following findings are not supported by the evidence:

(a) Finding No. 5 (p. 2 1.24 to p. 3 1.2 of Findings of Fact) insofar as it purports to find that Ewell Toobert was a landlord of the premises mentioned therein;

(b) Finding No. 7 (p. 3 1s. 7-15) Finding No. 9 (p. 3 1s. 24-31) Finding No. 10 (p. 3 1.32 & p. 4 1s. 1-8), Finding No. 11 p. 4 1s.

9-16) Finding No. 13 (p. 4, ls. 25-32), Finding 14 (p. 5, ls. 1-9), Finding 15 [51] (p. 5 ls. 10-17), Finding 17 (p. 5 ls. 26-32 & p. 6 1.1), Finding 18 (p. 6 ls. 2-10) insofar as these findings relate to Ewell Toobert, and find that he was the landlord of the persons named respectively as rent-payers in said findings, and find that he demanded and received certain sums respectively as rent of the respective premises described in said findings; for the sake of clarity, appellant hereby states that he does not on this appeal question the several maximum rents found in the foregoing findings, nor does he question the fact that the respective persons named as rent-payers in the said findings did in fact pay as rent the sums respectively therein found, without conceding that said sums or any part thereof was ever paid directly or indirectly to Ewell Toobert, or to any person on his behalf.

2. That the Findings of Fact are not supported by the evidence in that there is insufficient evidence to sustain the finding that Ewell Toobert was ever the landlord of any of the persons named as tenants in the findings, or that he ever demanded or received any over-maximum or other rents from said tenants or any of them.

3. That the Judgment is not supported by the evidence, in that there is insufficient evidence to sustain any judgment against Ewell Toobert as a landlord of said persons.

4. That the evidence is insufficient to establish that the defendant Ewell Toobert ever was the [52] landlord of Ida Mae Patrick, Jeffery Gassaway, Pearl Hildreth, Ernestine Coleman, Berdie Mae White, or Ethel Davis, or any of them, or that the relationship of landlord and tenant ever existed between defendant Ewell Toobert and any of the persons mentioned in this paragraph "4", or that defendant Ewell Toobert ever demanded or received from said persons or any of them any rent whatsoever.

5. That defendant Ewell Toobert was not the landlord of any of the tenants who paid over-maximum rents.

6. That defendant Ewell Toobert did not demand or receive, directly or indirectly, any over-maximum rents.

7. That the evidence establishes that defendant Jack Hammond alone was the landlord and that he demanded and received all of the over-maximum rents which are the subject of this action.

8. That the findings specified in Point 1, (a) and (b) are erroneous in that they are against the clear weight of the evidence in finding that Ewell Toobert was the landlord of any of the persons mentioned in said findings.

9. That the findings specified in Point 1, (a) and (b) are erroneous in that they are against the clear weight of the evidence in finding that Ewell Toobert ever demanded or received rent from any of the persons [53] mentioned in said findings.

10. That the Court erred in admitting hearsay evidence against the defendant Ewell Toobert over his objection.

Dated August 16, 1948.

/s/ GEORGE W. DOWNING, JR.,
Attorney for Defendant,
Ewell Toobert.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Aug. 20, 1948.

[54]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

The defendant and appellant Ewell Toobert hereby designates the following portions of the record, proceedings and evidence in the above entitled action to be contained in the record on appeal:

1. First Amended Complaint — filed December 17, 1947.
2. Answer of the Defendant Ewell Toobert to First Amended Complaint—filed January 17, 1947.
3. Plaintiff's Request for Admissions Pursuant to Rule 36—filed February 19, 1948, but not including the Exhibits attached thereto.
4. Defendant's statement in Reply to Plaintiff's Request for Admissions—filed March 1, 1948.
5. Findings of Fact and Conclusions of Law—filed April 7, 1948. [56]
6. Judgment—filed April 7, 1948.

7. Notice of Clerk of Entry of Judgment.
8. Motion for New Trial filed April 16, 1948.
9. Order Denying Motion for a New Trial—
filed April 23, 1948.
10. Notice of Appeal—filed June 5, 1948.
11. Statement Accompanying Cash Deposit in
Lieu of Undertaking on Appeal — filed June 5,
1948.
12. Statement or Certificate by Clerk of District
Court that \$250.00 cash was deposited with him on
June 5, 1948 in lieu of Undertaking on Appeal.
13. Order Extending Time to File Record on
Appeal—filed July 8, 1948.
14. Order Extending Time to File Record on
Appeal—filed July 20, 1948.
15. Any order made hereafter extending time to
file record on appeal.
16. Statement of Points on which Appellant In-
tends to Rely on Appeal.
17. Reporter's Transcript of Proceedings on the
Trial of this action.
18. This designation of Contents of Record on
Appeal.

Dated August 20, 1948.

/s/ GEORGE W. DOWNING, JR.,
Attorney for Defendant,
Ewell Toobert.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Aug. 20. 1948.

[57]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL AND
DOCKET ACTION

Good cause appearing from the affidavit of George W. Downing, Jr., made and filed herein,

It Is Hereby Ordered that the time for filing of the record on appeal with the Circuit Court of Appeals for the Ninth Circuit and for the docketing of this action in said Court be and it hereby is extended so that such record may be filed and such action may be docketed on or before September 3, 1948.

Dated August 30, 1948.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed Aug. 30, 1948.

[59]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 59, inclusive, contain full, true and correct copies of First Amended Complaint for Restitution and Injunction; Answer of Defendant Ewell Toobert to First Amended Complaint; Plaintiff's Request for Admissions Pursuant to Rule 36; Defendant's Statement in

Reply to Plaintiff's Request for Admissions; Findings of Fact and Conclusions of Law; Judgment; Notice of Entry of Judgment; Motion for New Trial; Order Denying Motion of Defendant Ewell Toobert for a New Trial; Notice of Appeal; Statement Accompanying Cash Deposit in Lieu of Undertaking on Appeal; Two Orders Extending Time to File Record and Docket Appeal; Statement of Points on Which Appellant Intends to Rely on Appeal; Designation of Contents of Record on Appeal and Order Extending Time to File Record and Docket Appeal which, together with copy of reporter's transcript of proceedings on March 22 and 23, 1948, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that the sum of \$250 was deposited with me in lieu of an undertaking for costs on appeal.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$14.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 31st day of August, A. D. 1948.

(Seal)

EDMUND L. SMITH,
Clerk.

In the District Court of the United States in and
For the Southern District of California,
Central Division

Honorable Charles C. Cavanah, Judge Presiding.

No. 7824-BH-Civil

TIGHE E. WOODS, Acting Housing Expediter,
Office of the Housing Expediter,
Plaintiff,

vs.

EWELL TOOBERT, JACK HAMMOND and
WILLIAM H. HALL, DOE I and DOE II,
Defendants,

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
Monday, March 22, 1948

Appearances: For the Plaintiff: Frank L. Hirst, Esquire. For the Defendant Toobert: George W. Downing, Jr., Esquire. For the Defendant Hammond: Harold J. Sinclair, Esquire. For the Defendant Hall: Ivan J. Johnson, III, Esquire. [1 *]

(Case called by the clerk.)

The Court: Are both counsel present?

Mr. Hirst: We have a number of counsel representing the different defendants, your Honor.

The Clerk: Is Mr. Downing here?

Mr. Downing: Yes; representing the defendant Toobert.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

The Clerk: Mr. Sinclair?

Mr. Sinclair: Here.

The Clerk: Mr. Ivan Johnson?

Mr. Johnson: Here. [3]

IDA MAE PATRICK,

called as a witness by plaintiff, being first sworn,
was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Ida Mae Patrick.

Direct Examination

By Mr. Hirst:

Q. Miss Patrick, where do you reside?

A. 422 East 15th Street.

Q. Do you recall when you first moved into that place.

Mr. Downing: I did not get that number.

(Answer read by the reporter.)

Q. By Mr. Hirst: Do you recall, Miss Patrick, when you first moved into that house?

A. Well, it was in October, the 26th, or November. I don't know just exactly. I paid my rent about three weeks before I went in and Mr. Hammond said the rent would start when I occupied the place.

Q. You moved in there either October or November 1946? [16]

A. No, '45.

Q. '45. Have you occupied that with your husband or by yourself?

A. With my husband.

Q. When you first rented the premises from whom did you rent them?

A. Mr. Hammond.

Q. Do you recall at this time where your con-

(Testimony of Ida Mae Patrick.)

versation, if any that you had, with Mr. Hammond took place?

A. In the home of Mrs. Coleman.

Q. And who was present at that time besides Mr. Hammond and yourself?

A. Mrs. Coleman.

Q. Mrs. Coleman. Do you recall what was said at that time with regard to the renting of these premises?

A. Well, he said it would be \$40.00 a month furnished.

Q. Furnished. Was there anything said at that time about the issuance of any receipts for the rent that you would pay? A. No.

Q. Did Mr. Hammond refer in his conversation with you as to Mr. Toobert in any way being connected with the property?

A. Not at that particular time; no.

Q. After you moved in there you lived there constantly [17] since the latter part of 1946?

A. '45.

Q. '45. How much rent have you paid each and every month that you have lived there?

A. Up until—

Mr. Sinclair: Just a moment, your Honor. There is an objection on that. It is too broad. I would like counsel to state the time these rents were paid.

The Witness: On the 26th of each month.

The Court: Just wait a minute. He is entitled to know the time.

Mr. Hirst: I will be happy to.

Q. You stated you were required or asked by Mr. Hammond to pay \$40.00 a month?

(Testimony of Ida Mae Patrick.)

A. Yes.

Q. Did you pay \$40.00 a month?

A. I did.

Q. For the first month you moved in there?

A. Yes, sir.

Q. Do you remember what day of the month you paid it on?

A. On the 26th of each month.

Q. That is your rent day, is it? A. Yes.

Q. Has it been that same day ever since you moved in? [18]

A. Yes. But, however, he has not picked that up on that date every month.

Q. How long did you pay \$40.00 a month rent?

A. I believe it was in July that the rent was cut to \$20.00.

Q. July of what year?

A. I don't have the exact date. I don't remember.

Q. July of what year?

A. In '47, I guess, '47 or—I think '47.

Q. July, 1947. That is last July?

A. July.

The Court: You say the rent was cut? Did you use the expression "cut"?

The Witness: Well, we were paying \$40.00 and Mr. Hammond said thereafter, in July—I think it was the latter part of July, that we would pay 20.

The Court: All right.

Q. By Mr. Hirst: And from July of '47 on have you paid \$20.00 every month?

(Testimony of Ida Mae Patrick.)

A. No. About, I guess, two months ago or three months, then he said we would pay \$18.00 thereafter; so that is what we have been paying.

Q. For the period from October or November, 1945 to July, 1947 did you pay \$40.00 a month each and every month? [19]

Mr. Sinclair: Objection, your Honor, on the ground that limitation of the case precludes the recovery of any rent beyond one year. Anything this witness testified beyond one year prior to the date of this action is immaterial.

Mr. Hirst: We cite some law there, your Honor. I call your attention to the fact, your Honor, that this action is one for restitution and is brought under Section 205(a) of the Act, and is not an action under 205(e) wherein the express provision for one year Statute of Limitations is provided.

There have been some decisions by appellate courts in regard to the application of the Statute of Limitations as regards suits for restitution filed by the Administrator or Housing Expediter. And, your Honor, one case that I will cite in particular is the case of *Blood v. Fleming*, reported in 161 Fed. (2d) 292. It is a Tenth Circuit decision. I will read here an excerpt from page 295 of that decision.

“* * * Section 205(a) creates a cause of action separate from that set out in Section 205 (e). It confers broad equitable powers upon the court giving it power to grant injunctions, enter orders of restitution, or any other equitable order conducive to proper enforcement of

(Testimony of Ida Mae Patrick.)

the provisions [20] of the Act. The limitations upon the powers of the court to proceed under the provisions of this section are governed by equitable considerations. Whether an action may be maintained under this section is not controlled by the one year limitation set up in Section 205(e). It may be instituted within such time as is not barred by laches.”

In other words, your Honor, the one year Statute of Limitations is strictly adaptable to the legal cause of action for the treble damages. But when we come into this court seeking restitution as a means of enforcing the rent regulations of the Rent Act, we are going under the equitable jurisdiction of this court and, of course, the traditional powers of equity require that only the doctrine of laches shall prevent the plaintiff from recovery in a suit in equity.

There is a more recent case than that, even, which has been decided by the Circuit Court of Appeals for the Fifth Circuit in the case of *Creedon v. Randolph*, and I haven't got the official citation for that, your Honor. That was decided on the 20th of January, 1948. In that case the Administrator had taken an appeal to the Circuit Court for the failure of the District Court to award restitution in a case that was presented as a default matter. It was [21] entirely presented as a default situation, and the court expressed itself in determining the case in the trial court that it had no jurisdiction to enter an order of restitution

(Testimony of Ida Mae Patrick.)

because the one year Statute of Limitations had expired.

(Further legal argument omitted from transcript.)

The Court: We have had this question up often as to under what circumstances the one year period of limitation applies, and I will have to overrule the objection. Go ahead.

Q. By Mr. Hirst: Mrs. Patrick, I believe the question was: Did you pay \$40.00 a month rent for each and every month from October or November, 1945 to July of 1947? A. Yes.

Mr. Downing: Just a moment. The previous question, your Honor, was 1946.

Mr. Hirst: No. She corrected me, counsel. She said that she first rented it in October or November, 1945.

Is that right, Mrs. Patrick?

Mr. Downing: Just so I get the facts.

Mr. Hirst: I had that same thought.

The Court: Go ahead.

Q. By Mr. Hirst: Is that true, Mrs. Patrick? You heard my question? A. Yes; I did. [22]

Q. Did you pay \$40.00 a month?

A. I paid \$40.00 a month.

Q. All right. To whom did you pay your rent?

A. Well, I paid it first to Mr. Hammond, and then he came by and told me that Mr. Hall would collect the rent; that he was so busy he didn't have time to come and collect it. So I don't remember the number of weeks or months that I paid to

(Testimony of Ida Mae Patrick.)

him. However, I have a book here. They didn't give me a receipt but they wrote it down in my book.

Q. May I see the book, please?

A. Yes; you may.

The Court: We will take a recess of 10 minutes.

(Short recess.)

Mr. Hirst: Your Honor, Mrs. Patrick has shown me a book which has entries in three different places, which are merely notations of the receipt of rent; and I will ask her to identify them here. I have show them to some of the counsel but not to all.

Q. Mrs. Patrick, I am showing you now the entries made—this is a day book, is it not, for 1939. Was that used for the purpose—

A. Well, this is the only thing that I had that I thought I could keep. Of course, the first mark on the back of the calendar—I destroyed my calendars that following year and threw that one out, but this is what I have now. [23] That is Mr. Hall's signature there.

Q. Now referring to the date on this date calendar, "Sunday-Sept. 3" there are various notations. The first notation is "Paid up to Sept. 26-46 \$40.00" with the initials "W.E.H." Will you state to the court what that entry represents there and who signed that?

A. I don't know Mr. Hall's full name. He happens to be here. But that is his initials.

Q. Did he make those initials himself?

(Testimony of Ida Mae Patrick.)

A. Yes.

Q. And did you pay him \$40.00? A. Yes.

Q. For that entry of that receipt there?

A. I did.

Q. Is that true, the same testimony you have given, is that also true as to the next entry which includes the period "Paid up for Oct. 27th-46" and same initials?

A. Yes; those are the same initials.

Q. Was that personally placed there by Mr. Hall? A. Yes.

Q. Is that also true for the November entry there? A. That is also true.

Q. With reference to the last page, the last white sheet in the book, under the date of "Monday-Dec. 25" and "Tuesday-Dec. 26" there is a list of receipts there starting [24] with "Paid For Nov. until Dec. 17." That is for what year? Does that pick up where these others left off?

A. That picks up from that, this one here.

Q. All right. That is, then, from '46, is that right? A. Yes.

Q. And the various other entries on that sheet, are they also written by Mr. Hall?

A. They are all by the same initials and these are written by Mr. Hall.

Q. They are all in response to the payment for the rent? A. For the rent.

Q. Which was how much? A. \$40.00.

Mr. Hirst: Your Honor, I could extract these, I believe, for the purposes of concising the exhibit.

(Testimony of Ida Mae Patrick.)

I would like to offer the notations that Mr. Hall made.

The Court: Pass it to counsel and let them see it.

Mr. Downing: Why don't you offer that whole book?

Mr. Hirst: I think it would be more practical--

Mr. Downing: I certainly would object to cluttering up the record with anything unnecessary.

The Court: What part do you wish to offer?

Mr. Hirst: I offer the part to which she has already referred and testified to.

The Court: It may be admitted. [25]

Mr. Sinclair: May they all go in as one?

Mr. Hirst: Yes.

The Clerk: How many are there?

Mr. Hirst: There are just those two pages.

The Clerk: Plaintiff's Exhibit 6.

The Court: I will state to counsel with regard to your objection a minute ago with regard to the one year Statute of Limitations, the court is receiving this evidence, but you will have a right to represent it before the close of the case if you wish. I want to get the facts to see whether they come in under your objection, so you are not barred from raising it. But I think I should hear the facts.

Mr. Downing: On behalf of our defendant, too, your Honor, our position is the same; and we have applied the Statute of Limitations. It did not occur to me as necessary to elaborate in defense of that to the court at this time.

The Court: The court is reserving the right to finally rule on that limitation until after I hear the

(Testimony of Ida Mae Patrick.)

evidence as to what the mathematics of the situation is. I cannot determine it right off now. You will understand that you are not barred from raising it hereafter.

Mr. Sinclair: Thank you, your Honor.

The Court: I think that is the only way I can do, because some courts hold one way and some the other. Go ahead. [26]

Q. By Mr. Hirst: Mrs. Patrick, you stated that you did pay some of the rent to Mr. Hammond?

A. Yes.

Q. When was that that you first paid him any rent?

A. Oh, after Mr. Hall—

Q. No. When did you first pay Mr. Hammond any rent?

A. Oh, that was in '45.

Q. When you first rented the premises?

A. Yes. And I last paid him the 26th—it was due the 26th—but he picked it up the 28th of February.

Q. Of this last month?

A. Yes.

Q. Let us keep the two periods separate now. When you first went in there and stated you paid to Mr. Hammond, for how long a period did you pay to Mr. Hammond?

A. Well, until Mr. Hall started collecting the rent.

Q. Do you remember on or about when that was?

A. I don't remember the date.

Q. Do you know whether you paid to Mr. Hammond for two months or three months?

A. Oh, longer than that.

Q. Was it six months?

A. Maybe a year.

(Testimony of Ida Mae Patrick.)

Q. Did he or did he not give you any receipt for it?

A. This is the only receipt that I have ever been [27] given and on the back of a calendar.

Q. But you do not have even that marked down portion for the part that he first collected when you went in there?

A. No; I don't have that. That is out of my book. I don't know just how that got out, but it is out, I see. But I just have this, and it must have been September he picked up, Mr. Hall. That is what I have.

Mr. Hirst: Your Honor, I believe the part to which the witness is referring is beyond the period included in our complaint, at which time the rent had already been reduced by Mr. Hammond, pursuant to her previous testimony that in July of 1947 the rent was reduced to \$20.00, and then later to \$18.00 a month.

Q. That is true, is it not? A. Yes; it is.

Q. But as to the first part of your occupancy there you did not have any sort of record of a receipt?

A. I don't have the record of that, no more than what I paid Mr. Hall.

Q. But you paid Mr. Hammond the same amount, was it, \$40.00?

A. I paid him the same amount.

Q. You stated earlier in your testimony that there was a conversation that you had with Mr. Hammond with regard to Mr. Toobert. Will you

(Testimony of Ida Mae Patrick.)

please state where that conversation [28] took place? A. Mr. Hammond called—

Mr. Downing: Just a minute, please.

Mr. Hirst: Just a moment, please. We are laying a foundation here first.

Q. Where did this conversation take place?

A. Mr. Hammond called me over the phone and said that Mr. Toobert would pick the rent up.

Mr. Downing: Just a minute. May I move to strike out the portion of that answer which was not responsive and beyond the confines of the question?

The Court: He is asking you to relate a place and time before you go into the conversation. So the objection will be sustained.

A. Well, I really don't know the exact time, because it was in the evening when I returned from work. It must have been about 8:30 or 9:00 o'clock at night. It was on the telephone.

Q. By Mr. Hirst: Do you remember about how long after you first moved into the house that you had this conversation?

A. Oh, this was recently that I had the conversation.

Q. It was recently. How recently?

A. I don't know.

Q. Was it last month or last two months ago?

A. Well, it must have been a month before. It was about the last of January or the first of February.

Mr. Sinclair: We move that that answer be stricken.

(Testimony of Ida Mae Patrick.)

The Witness: He said that he would not be picking up the rent. Mr. Toobert would be picking it up.

Mr. Sinclair: We move to strike out what was said in January of this year.

The Court: Beyond the one year period.

Mr. Hirst: It is beyond the period, your Honor. I frankly do not know what the testimony will be as to the conversation.

The Court: As I said, counsel, I am receiving this and I am reserving the ruling on it because I am unable to determine when it is going in. You understand your rights will be heard on it; you are not foreclosed.

Mr. Downing: I do not know whether the counsel has asked the witness to state the conversation yet or not.

Mr. Hirst: Not yet I haven't.

Mr. Downing: After you do, I would like to make an objection.

Mr. Hirst: Your Honor, perhaps if I asked the witness myself I may know whether I should persist or not. I can pretty well tell whether it will have the elements of admissibility or not.

The Court: You may do so. Consult with the witness. [30]

Q. By Mr. Hirst: I will ask the witness, then, to state what conversation took place over the telephone with Mr. Hammond on this occasion that you refer to. What was the conversation?

The Court: Now, wait a minute. Do not answer until counsel have an opportunity to object.

Mr. Downing: To which we make objection on

(Testimony of Ida Mae Patrick.)

behalf of the defendant Toobert that the conversation is as to him pure hearsay, not binding upon him. Those are the objections.

Mr. Hirst: Your Honor, I will admit that we have to tie up the defendant Toobert with the defendant Hammond.

The Court: I will allow it, with such tying up, as you refer to it. If not, it would be hearsay. With that understanding, go ahead. You have got a situation here and I have got to receive the evidence the best way I can, and then we will size it up at the last as to what is admissible.

Q. By Mr. Hirst: What was the conversation, Mrs. Patrick? What did you say and what did he say?

A. Well, he called over the phone and said that he would not be able to pick the rent up any more; that Mr. Toobert would pick up the rent himself hereafter. And I don't remember what day that was or what date it was, but I know it was in the last four or five weeks ago.

Q. Was that all that was said? [31]

A. Yes.

Mr. Hirst: That is all, Mrs. Patrick.

The Court: Just wait a minute. They might want to ask you a question in cross examination.

Mr. Downing: I have no questions.

Cross Examination

By Mr. Sinclair:

Q. Mrs. Patrick, you said that you paid—

The Court: Speak a little louder so that she can hear you.

(Testimony of Ida Mae Patrick.)

Q. By Mr. Sincalir: You said that you paid some money to Jack Hammond, is that right?

A. I paid him the amount of rent that I was supposed to pay him on the 28th day of February.

Q. As a matter of fact, Mrs. Patrick, you paid that sum, part of it was for rent and part of it was for something else; isn't that correct?

A. No; it was not.

Q. You say it was in February. What year was that? A. Pardon me?

The Court: You say in February. What year was that, do you remember?

The Witness: '48.

The Court: 1948. Do you know the amount you paid him?

The Witness: \$18.00 [32]

The Court: \$18.00.

Q. By Mr. Sinclair: Just a couple of questions, Mrs. Patrick. Can you remember at this time what period that you paid this \$40.00, I believe you said, to Mr. Hammond? I mean you paid to Mr. Hammond direct? A. What period?

Q. Yes. What period did you pay this money to Mr. Hammond after the time you moved in? You moved in about October of '45. Did you pay Mr. Hammond for the month of October, 1945?

A. I paid Mr. Hammond before I moved in. He said, "Your rent will start when you occupy the place."

Q. I see. A. That was on the 26th.

Q. 26th of what month? A. October.

Q. October. A. 1945.

(Testimony of Ida Mae Patrick.)

Q. Did you pay him any monies after that month? Did you pay him directly any money after that month? A. I paid him directly.

Q. For how many months?

A. For some period of time. I don't know because I don't have a receipt.

Q. All right. You can't testify that a bill was paid [33] by presenting a receipt, or testify it was paid. Will you tell us for how many months exactly you paid him?

A. I don't know how many months.

Q. In other words, could it be one month?

A. You know it was more than one month. Probably a year and six months I paid Mr. Hammond. I know it was more than a year that I paid him.

The Court: Counsel, we can't get these periods of time.

Mr. Sinclair: She has an overlap here. I wanted to clear that up.

Mr. Hirst: Her testimony is she paid \$40.00 each and every month she was in there until July, 1947.

The Court: How many months was that. The court has got to know something about it.

Mr. Hirst: Yes. Well, we have the testimony here, or I might ask her on redirect to clear it up.

The Court: You must let me know how long she paid it.

Mr. Hirst: She doesn't know exactly how many months she paid it, but she knows it was at least a year, to Mr. Hammond directly, and thereafter she has paid it to Mr. Hall, which she has receipts to cover that period.

(Testimony of Ida Mae Patrick.)

Mr. Sinclair: Counsel, if you are going to testify you should take the stand and be sworn.

Mr. Hirst: Counsel asked me a question, counsel. [34]

The Court: I am trying to find out when it commenced and when it ended.

The Witness: Well, Judge, your Honor, I had nothing to go by but the book and, as I told him, part of it has been destroyed.

Mr. Sinclair: That is all.

The Court: That is not for the court to say. I am just trying to find out what the facts are.

Redirect Examination

By Mr. Hirst:

Q. You stated that your first month in there. Mrs. Patrick, was in October of 1945. A. '45

Q. And you first paid your rent to Mr. Hammond? A. To Mr. Hammond.

Q. For how long a period are you sure you paid it to Mr. Hammond directly before you started to pay it to Mr. Hall?

A. For better than a year I am sure.

Q. Then after that time to whom did you pay it?

A. To Mr. Hall.

Q. Until what time? A. In July.

Q. Of what year? You have to be specific?

A. '47, I believe. [35]

Mr. Hirst: That is as good as I can do, your Honor.

The Witness: July of '47.

The Court: Go ahead. We will have to figure it out.

(Testimony of Ida Mae Patrick.)

Mr. Hirst: This exhibit, your Honor, will clarify the period subsequent to September, '46.

The Court: Paid to Hall commencing with September, 1946?

Mr. Hirst: Yes. From that time on there is a notation here for a period of several months.

The Court: Paid to Mr. Hall commencing in September, 1946, and for how long, until when?

Mr. Hirst: Until August of 1947, your Honor.

The Court: Until August. All right. Now we have got between those times.

Mr. Hirst: Before October, 1946, your Honor, or, I should say September—I am looking at the wrong entry there. The rent was paid to Mr. Hammond, is that right?

A. Up until that time, up until Mr. Hall took over.

Mr. Hirst: That is all.

Mr. Johnson: I would like to ask a question or two.

Cross Examination

By Mr. Johnson:

Q. Mrs. Patrick, do I get your testimony now that you began paying Mr. Hall in September of '46? Does the record show there? [36]

A. You know, I have nothing to go by.

Q. You do not have very much there.

A. That is all I have.

Q. I wonder if you could refer to this now and tell up when Mr. Hall received the first?

A. I told you at the beginning I didn't know the exact date that Mr. Hall started collecting the

(Testimony of Ida Mae Patrick.)

rent, but I believe he quit in July, the last of July.

Q. That is of '47? A. Yes.

Q. And you can't recall now by looking at your notes there as to when he started?

A. Well, because some of my notes are gone. You see, they didn't give me no receipt. They just marked that in this book, and carelessly handling this book, I guess some of it got destroyed.

Q. Mr. Hall lived there on these premises, too, did he not? A. At that time; yes.

Q. At that time. And do you recall when he moved in? You were there prior to him, were you not?

A. Yes; I was, but I don't know when he moved in.

Q. You don't know when he moved in. How did he start collecting the rents there? Will you tell the court?

A. Mr. Hammond said that Mr. Hall would pick the rent [37] up, that he didn't have time to do it.

Q. Did you have an understanding that Mr. Hall was your landlord or agent to collect that rent?

A. No; he wasn't supposed to be the landlord. He was working for Mr. Hammond, I suppose.

Q. Did you have a conversation with Mr. Hall about the collection of those rentals?

A. No. Mr. Hammond said that he would pick it up, and then Mr. Hall came by and collected on the day that it was due.

Q. You understood that the money was to be turned over to Mr. Hammond, is that correct?

(Testimony of Ida Mae Patrick.)

A. Yes.

Mr. Sinclair: May we have an objection to that?

The Court: Now, he objects that may be a conclusion. Do you know that Mr. Hall was to turn this money over to Mr. Hammond? That is the question. If you don't know it, say so. If you do, how do you know it?

The Witness: I beg pardon?

The Court: He is asking you the question: Do you know whether Mr. Hall was to turn this money over?

A. Oh, no; I don't know that. I know Mr. Hall was presumed to collect the rent. I couldn't say positively that he turned it over.

Q. By Mr. Sinclair: As a matter of fact, you moved [38] into those premises in December of 1945, is that correct? A. What?

Q. As a matter of fact, you moved into those premises in December of 1945, isn't that correct?

A. No; I did not. I moved into those premises in October.

Mr. Sinclair: All right, thank you.

Redirect Examination

By Mr. Hirst:

Q. With regard to that conversation with Mr. Hammond that counsel just asked you about, what was the reason that Mr. Hammond gave for Mr. Hall picking up the rent?

A. He said that he was busy, building, doing some building; that he wouldn't have time to pick it up.

Q. I see.

(Testimony of Ida Mae Patrick.)

A. So, for us to pay our rent to Mr. Hall.

Mr. Hirst: That will be all. Is Mr. Gassaway in court?

JEFFERY GASSAWAY,

called as a witness by the plaintiff, being first sworn,
was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Jeffery Gassaway. [39]

Direct Examination

By Mr. Hirst:

Q. Mr. Gassaway, what is your business or occupation?

A. Well, I work at the used car park there.

Mr. Downing: I can't quite hear the witness.

Mr. Hirst: Louder, please.

A. I say, I work at a used car lot.

The Court: You will have to talk louder.

Q. By Mr. Hirst: What do you do? What is your work?

A. Well, I buff cars.

Q. Did you ever live at 422 $\frac{1}{4}$ East 15th Street, Los Angeles?

A. I did.

Q. Do you recall when you moved in there?

A. About the latter part of September, 1945.

Q. When I ask you dates, now, refer to the year as well because we overlap a number of years here. What year was it?

A. I said about the 21st of September in 1945.

Q. How long did you stay in there?

A. I stayed there until about the 10th of April, 1946.

(Testimony of Jeffery Gassaway.)

The Court: I can't hear you. The 10th of April, 1946? A. 1946.

Q. By Mr. Hirst: From whom did you rent the [40] accommodations there?

A. I rent from Mr. Hammond.

Q. Mr. Hammond, Jack Hammond?

A. That is right, sir.

Q. Do you recall what conversation you had when you first rented it from Mr. Hammond? What did he state as to the rent, if anything?

A. He state \$40.00 a month.

Q. Did you pay \$40.00 a month?

A. I sure did.

Q. And to whom did you pay it?

A. To Jack, Mr. Hammond there.

Q. Was that true all during the time you lived there? How long did you pay it to Mr. Hammond?

A. Until the 10th of March, '46.

The Court: March, 1946.

Q. By Mr. Hirst: And at that time you paid the rent up until April, did you?

A. That is right.

Q. How much rent did you pay all during the time you were there?

A. I say, I paid \$40.00 each month.

Q. Did you get a receipt for it?

A. No receipt.

Q. Was there anything said about receipts with Mr. [41] Hammond? Did you ask for one or did he offer one?

A. He said he didn't give receipts. He said he didn't give no receipt.

(Testimony of Jeffery Gassaway.)

Q. Did Mr. Hammond ever refer to Mr. Toobert as in any particular as to these premises here? Did he ever mention his name at all to you?

A. Not to me.

Mr. Hirst: That is all.

Mr. Downing: No questions.

Mr. Sinclair: No questions.

Mr. Johnson: Just one question.

Cross Examination

By Mr. Johnson:

Q. Did you ever pay any rent to Mr. Hall?

A. No; I didn't.

Mr. Johnson: That is all.

Mr. Hirst: That is all. Mrs. Hildreth, please.

PEARL HILDRETH,

called as a witness by plaintiff, being first sworn,
was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Pearl Hildreth?

Direct Examination

By Mr. Hirst: [42]

Q. Mrs. Hildreth, where do you live?

A. 4221 $\frac{1}{4}$ East 15th Street.

Q. When did you move into that address?

A. April the 10th, 1946.

Q. To whom did you pay your rent?

A. To Jack Hammond.

Q. How much rent did you pay?

(Testimony of Pearl Hildreth.)

A. \$40.00 a month.

Q. How long did you pay rent to Mr. Hammond?

A. The rent was paid to Mr. Hammond from April, 1946 until December, 1946.

Q. In December, 1946 what happened with regard to the person to whom you paid your rent from that time on?

A. Mr. Hammond went out of town and he told me to pay the rent to Mr. Hall.

Q. Did he say to pay it just that one time to Mr. Hall, or what was the conversation?

A. Well, just pay the rent to Mr. Hall. I paid the rent to Mr. Hall for about, until July of 1947.

Q. Then after July, 1947 to whom did you pay it?

A. Well, Mr. Hammond picked the rent up twice.

Q. That was after July, 1947?

A. That is right.

Q. Now, from the period from April 10, 1946 to July, 1947 how much rent did you pay each month? [43] A. \$40.00.

Q. Have you ever seen Mr. Toobert before?

A. Yes; I have.

Q. Will you describe the circumstances under which you first met Mr. Toobert?

A. I had a fire in my home in 1946 on October 5th. Mr. Toobert knocked on the door and said he was the owner of the property. He came down with the insurance fellow to see about the damage that was done. I asked Mr. Toobert if he would

(Testimony of Pearl Hildreth.)

fix the windows on the house. He had already had the house painted. He said he would get around to that later. I told him I was paying \$40.00 a month; I thought that ought to be enough; that he should fix the windows, which the windows haven't been fixed until yet.

Q. What did he say, if anything?

A. Well, he and the insurance fellows began to talk, and he told me that he would have the windows fixed.

Q. Do you recall anything else that was said during that conversation?

A. No; no more than he asked me and the fellow, the insurance fellow, do he think the place looked all right, and that is how we got around to the conversation about the windows and that was practically all.

Mr. Hirst: All right, that is all. [44]

Cross Examination

By Mr. Sinclair:

Q. Mrs. Hildreth, you said that on April 14 to December 14 that you gave this money to Mr. Hammond? A. Yes.

Q. And then from December 1, 1946 to what date did you testify you paid Mr. Hall? I didn't hear that.

A. The rent was due on the 10th of each month.

Q. Yes. Let me put it like this: How long or for how many months did you pay this rent to Mr. Hall?

(Testimony of Pearl Hildreth.)

A. Let's see; September until July of '47; December, '46 until July of '47.

Q. Mrs. Hildreth, as a matter of fact this money that you paid, part of it was for rent and part of it was for something else; isn't that correct?

A. My understanding it was for rent.

Mr. Sinclair: That is all.

Mr. Johnson: Just one question.

Q. During the time that you were paying this rent to Mr. Hall he was living on those premises, is that correct? A. Yes; he was.

Mr. Johnson: That is all.

Cross Examination

Q. Mrs. Hildreth, you have seen Mr. Toobert, you say, [45] only once before?

A. No. I saw Mr. Toobert, he was at the place two or three times while it was being fixed.

Q. This was following the damages which were caused by fire? A. That is right.

Q. And he came down there with the insurance adjuster? A. And said he was the owner.

Q. And examined the portions of the building which had been damaged in that fire, is that right?

A. That is right. Also, he came by to see the people that was working for him. He had working for him two fellows that done the work in the house.

Q. You mean this was in repair of some damages caused by the fire? A. That is right.

Mr. Downing: That is all.

Q. By Mr. Sinclair: When was this, Mrs. Hildreth?

(Testimony of Pearl Hildreth.)

A. October the 5th when that fire was in 1946.

Mr. Sinclair: No further questions.

The Court: That is all. You are excused.

Mr. Hirst: Mrs. Coleman, please.

ERNESTINE COLEMAN,

called as a witness by the plaintiff, being first sworn,
was examined and testified as follows: [46]

The Clerk: Will you state your name, please?

The Witness: Mrs. Ernestine Coleman.

Direct Examination

By Mr. Hirst:

Q. Mrs. Coleman, where do you live?

A. 442 $\frac{3}{4}$ East 15th Street.

Q. Did you ever live at 422 $\frac{1}{4}$ East 15th Street?

A. I did.

Q. Do you recall when you lived there?

A. I moved in there July the 16, 1945.

Q. For how long a period did you live in that particular accommodation?

A. I only stayed there just not quite two months.

Q. From whom did you rent it?

A. From Mr. Jack Hammond.

Q. What rental arrangements were made with Mr. Hammond with respect to this apartment?

A. Well, when I moved in I paid him \$42.00 for the first two months that I was in the place in that particular address.

Q. Did he give you any receipts for that?

A. No; he didn't.

Q. Did you ask for any?

(Testimony of Ernestine Coleman.)

A. No; because he told me that he wasn't giving receipts. [47]

Q. After you were in there for two months then what happened? A. I moved in 422 $\frac{3}{4}$.

Q. Have you lived in there continuously since that time? A. Until this time up until now.

Q. Following your moving into the place you are in now, 422 $\frac{3}{4}$, your arrangements for transfer there, were they made with Mr. Hammond also?

A. No. I asked him could I take that place after it got vacant. He said, "Sure."

Q. Who was living in it at the time?

A. At the time, white people were living in there when I moved in.

Q. Did he allow you to take the place then?

A. He told me I could take it.

Q. And what did he specify the rent would be?

A. Well, after—you see, when I first moved in I paid him 42 for a couple of months. Then after the white people moved out and the colored moved in, then I paid 40 just like they did; I started paying \$40.00 rent then.

Q. Did you pay that to Mr. Hammond?

A. For so long a time, until I started paying it to Mr. Hall.

Q. How long a time did you pay it to Mr. Hammond, do [48] you recall, after you moved there to 422 $\frac{3}{4}$?

A. Well, I paid it to Mr. Hammond up until after Mr. Hall moved in the place, and Mr. Hall was in the place about two or three months, then

(Testimony of Ernestine Coleman.)

Mr. Hammond came by and told us to pay Mr. Hall the rent, that was around about in '46, around about February or March when we started paying—when I started paying Mr. Hall my rent.

Q. February or March, 1946?

A. Around about that time.

Q. You started to pay Mr. Hall from that time on?

A. Yes.

Q. What was the conversation you had with Mr. Hammond? You testified Mr. Hammond came and told you to pay Mr. Hall. Do you recall?

A. He came and told me that he was working and it was so inconvenient for him to get down about the rent, and just take the rent over there and give it to Mr. Hall.

Q. And did you do that?

A. I did.

Q. For how long a time thereafter did you pay Mr. Hall the rent?

A. I paid Mr. Hall the rent up until about July of '47.

Q. After July, 1947 who did you pay it to?

A. To Mrs. Dodson. [48-A]

Q. Mrs. Dodson?

A. Mrs. Dodson.

Q. How do you spell that, please?

A. D-o-d-s-o-n.

Q. Who was it that told you or directed you to pay your rent to Mrs. Dodson?

A. He told me.

Q. Who was that?

A. Mr. Hammond told me to leave it over there with her and he would pick it up.

(Testimony of Ernestine Coleman.)

Q. Where does Mrs. Dodson live, do you know?

A. 424 East 15th Street.

Q. After July, 1947, what rent did you pay there, how much?

A. In July, '47 the rent went down to 20, and then he told us after then we would pay 18.

Q. Did you ever have any conversation with Mr. Hammond about receipts? Did you ever ask him for receipts?

A. Well, only once we talked about it he told me he wasn't giving any receipts, just like he first said when I moved in there. He told me first he wasn't giving any receipts.

Q. What did he say when you first moved in there? A. Told me he wasn't giving receipts.

Q. Have you ever seen Mr. Toobert? [49]

A. Several times.

Q. Under what circumstances have you seen Mr. Toobert?

A. Well, only once he came to the house and looked around, you know, the yard, that he was going to repair the places, and then several more times he was in the court, you know, just looking over the property and houses and things, and I only come in contact with him once, myself, to talk to him.

Q. What was said at that time?

A. He said he was just looking the place over; he was going to repair them and he was looking at my porch at the time, and he was on the steps, and he said, "They need a repair." And he was going to repair the places.

(Testimony of Ernestine Coleman.)

Mr. Hirst: That is all.

Mr. Sinclair: Just a moment.

Cross Examination

By Mr. Sinclair:

Q. Mrs. Coleman, during the time you occupied these premises did you pay your rent in advance, a month in advance, did you?

A. I paid in advance when I moved in.

Q. Now, of all the other parties here, I believe you occupied these premises before any of the others, is that correct? A. That is right. [50]

Q. At the time you moved in, Mrs. Coleman, did you have a conversation with Mr. Hammond with reference to certain decreases?

A. No; not that I recollect.

Q. As a matter of fact this money that you did pay Mr. Hammond, part of it was for rent and part of it was for something else; isn't that correct?

A. It was for rent.

Q. And it was February 1946 that you say you started to paying Mr. Hall?

A. It was around about February or March; it was after the first of the year.

Mr. Sinclair: All right; that is all.

Mr. Johnson: No questions, your Honor.

Mr. Downing: Just a minute.

Cross Examination

By Mr. Downing:

Q. When did you talk to Mr. Toobert?

A. I don't know. It was in the summer months in—

(Testimony of Ernestine Coleman.)

Q. What year? A. In 1946.

Q. The summer of 1946? A. Yes.

Q. Who else was present? A. No one. [51]

Q. Was that the first time you ever saw him?

A. No; that was not the first time I saw him.

Q. The first time you ever talked to him?

A. Yes; that was the first time and the only time.

Q. Did you introduce yourself to him?

A. No; I didn't. I saw him. He was out around in the yard, looking over the place, and I went out. He said, "Well, I am just looking around to see what repair needs done on the houses."

Mr. Downing: That is all.

The Court: Is that all?

Mr. Hirst: That is all.

The Court: Recess until 2:00 o'clock.

Mr. Hirst: Thank you.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day, Monday, March 22, 1948.) [52]

Los Angeles, California

Monday, March 22, 1948, 2:00 p.m.

The Court: You may proceed.

Mr. Hirst: Mrs. White, please.

BERDIE MAE WHITE,

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Berdie Mae White.

Direct Examination

By Mr. Hirst:

Q. Mrs. White, where do you live?

A. 424 East 15th Street.

Mr. Johnson: May I have her address again, please?

(Answer read by the reporter.)

Q. By Mr. Hirst: How long have you resided there?

A. Oh, about two years and a half.

Q. Will you clarify just what you mean by living at 424? There are a number of accommodations there at that same address, are there not?

A. Oh, upper front.

Q. You live in the upper front portion of that address? A. That is right.

Q. Do you remember when you first rented the accommodations? [53] A. Yes; I do.

Q. Do you remember the approximate date?

A. October the 10th in 1945.

Q. From whom did you rent the apartment?

A. Jack Hammond.

Q. Do you recall at this time that conversation that was had with Mr. Hammond at that time?

A. No. My husband, he made the play with Jack to rent the place and he had to leave town the next morning. He is a train man.

(Testimony of Berdie Mae White.)

Q. Were you present when the arrangements were made? A. Yes.

Q. You were present? A. Yes; I was.

Q. With your husband? A. Yes, sir.

Q. Who else was there besides Mr. Hammond?

A. Just Mr. Hammond, myself, and my husband.

Q. Where did that conversation take place?

A. At 424 East 15th Street.

Q. At the site of the place where you lived?

A. No. I had a room there at the time.

Q. What was the conversation, now, as you recall it?

Mr. Downing: Just a moment. That is objected to so far as the defendant Toobert is concerned on the ground that to [55] him it is hearsay and is not binding. And I would suggest we have some understanding here as to all the conversations, in the interest of brevity of the trial. Would that be satisfactory?

Mr. Hirst: As I stated before, I understand there is to be a link-up there with Mr. Toobert.

The Court: This is preliminary, leading up. You have to make the connection with your client.

Mr. Downing: Yes; for that connection cannot be established by conversation at which he was not present and in which he took no part.

The Court: Of course, I am not expressing any opinion because I had not thought of it. But you have got to see whether they lead up, preliminarily, to make the connection as to whether Hammond was representing your client or to make that

(Testimony of Berdie Mae White.)

connection. But it is just a question of order of proof, that is all. Overruled. Go ahead.

Q. By Mr. Hirst: Will you state what you can recall of the conversation that took place at that time?

A. Well, it was—I think it was the Spanish lady had the front, and my husband said when she moved, “Could I have that front apartment?” And he said that you could, but it costs you \$40.00 a month. And so he said, “Well, I will be out of town but I will have my wife go by the bank and get you the \$40.00 and bring it to your house the [55] next day.” Well, I went to work the next day and didn’t get to carry it, but that Tuesday I carried it. That was on Monday, so that Tuesday morning I laid off of work and carried the \$40.00.

Q. How long before the 10th of October was that?

A. The Sunday was the 10th, but I didn’t give him the money until Tuesday, I think it was.

Q. Did you ever receive a receipt from Mr. Hammond for the rent that you paid him?

A. No; I didn’t receive a receipt, but he made me out a slip of paper, just said like “October the 10th, to November 10th.”

Mr. Sinclair: If the court please, we object to that because the slip of paper is the best evidence.

The Court: Sustained.

Q. By Mr. Hirst: You do not have that paper with you.

A. No; I don’t have it. It got misplaced.

Q. Do you know what happened to that paper?

(Testimony of Berdie Mae White.)

A. No; I surely don't. It was just a little old loose piece of paper. It just wasn't a receipt. He said, "I don't give no receipts." I said, "Well, you can show me something for my money, can't you?" So he just wrote "October 10th until November 10th" and that is all.

Q. How long did you pay your rent to Mr. Hammond after you moved in there? [56]

A. I paid him from October the 10th in 1945 until about April the 10th in 1946.

Mr. Sinclair: The complaint states that she moved in from October the 7th, 1946.

The Witness: 1945.

Mr. Sinclair: I believe her testimony in chief was 1946 and her complaint says 1946. Now, I think that is the only issue involved, your Honor, as far as 1946. There is no issue tendered before that date.

The Court: I say, I made a ruling on that. The complaint does say 1946, during that year. That is your schedule attached to your complaint.

The Witness: Well, I really think that it was 1945 in October.

Mr. Hirst: Your Honor, I do not believe that I will ask the court's permission to amend the complaint to go back any further than we have already alleged. Therefore, I will restrict our testimony insofar as overcharges for the period from October, 1946 on. But the testimony of the witnesses as to the rental arrangements, I believe are very material to the transactions that took place

(Testimony of Berdie Mae White.)

at a subsequent period. For that reason I have gone into those on direct examination.

The Court: For mathematically determining the amount, you will limit yourself to 1946?

Mr. Hirst: That is right, your Honor. [57]

Mr. Sinclair: That is all right. We will accept that statement.

The Court: Very well. You say you went in there November 11, 1945—see if I am correct—remained until September 7, 19 what, the same year or the next year? How long were you in there? The Witness: In the house?

The Court: Yes.

The Witness: This is going on my third year.

The Court: You remained there, then, until 1947, did you?

The Witness: I am still there now.

The Court: All right. It is just a question of when you went in first. All right; I just want to get your dates. You were there until 1947?

The Witness: Yes, sir.

The Court: September what?

Q. By Mr. Hirst: How long a time did you pay Mr. Hammond the rent?

A. Well, I paid him from October the 10th until—

Q. October 10th of what year? Always mention the year. A. Well, that was in 1945.

Q. All right.

A. Until April 10th in '46. I think that is when Mr. [58] Hall took it over.

(Testimony of Berdie Mae White.)

Q. What happened on or about April 10, 1946 with reference to the collection of the rent?

A. Well, Mr. Hammond said that he was busy, I think building some houses or something, and he wouldn't have time to come by and collect the rent, just give it to Mr. Hall.

Q. Did Mr. Hammond come to you to tell you that? A. He told my husband.

Q. Were you present when he told him?

A. Yes; I was present.

Q. From that time on, namely, April 10, 1946, to whom did you pay the rent?

A. Mr. Hall.

Q. And how much rent did you pay Mr. Hall?

A. \$40.00 a month.

Q. Did you pay him \$40.00 a month right along?

A. I paid him \$40.00 a month until in July. Mr. Hammond had a meeting and he said that he wanted us to pay him \$50.00 a month and I told him—

Q. Just a moment. What do you mean by a meeting?

A. Well, he had all the tenants to get together in the downstairs of our house, I mean that big house.

Q. Where is that at?

A. 424 East 15th Street.

Q. Do you recall who all was present at that time? [59] A. Yes; I do.

Q. Would you please name the parties that were there?

(Testimony of Berdie Mae White.)

A. I surely will. Mrs. Ernestine Coleman, Mrs. Pearl Hildreth, my husband, Willis White, Berdie Mae White. I think that is about all I can recall right at the present.

Q. And Mr. Hammond?

A. And Mr. Hammond.

Q. What did Mr. Hammond say, if anything, and what did any of you people say, if you can tell at this time?

A. Well, he said the rent had gone up to \$50.00 a month. He said we could pay it if we wanted to or we could get out, or we could go to the OPA and use that attorney if we wanted to. We could pay it if we wanted to; if not, we could do the next best thing.

Q. What did you do?

A. I went to the OPA as he advised me to.

Q. After this conversation with Mr. Hammond and your subsequent trip to the OPA, how long after that did you go to the OPA, how soon?

A. Well, I went the very next day, and they told me that I was paying too much rent; the ceiling price was only \$16.00.

Mr. Sinclair: I move that go out.

Mr. Hirst: That is all right to go out, your Honor.

The Court: The last expression may be stricken.

Mr. Hirst: I just wanted to know when she went.

Q. After you had been to the OPA how much rent did you continue to pay Mr. Hammond?

(Testimony of Berdie Mae White.)

A. I mailed Mr. Hammond \$16.00 a month.

Q. Where did you mail it to?

A. 421½ East 25th Street.

Q. East 25th? A. East 25th.

Q. Is that the manner in which you paid your rent from that time on? A. Yes, sir; it is.

Q. Mailed it each month to him?

A. Yes, sir.

Q. Is that the amount of rent you have paid since that time? A. Since that time; yes, sir.

Q. \$16.00 a month? A. Yes, sir.

Q. Have you ever seen Mr. Toobert before today? A. Yes, I surely have.

Q. On approximately how many occasions have you seen Mr. Toobert?

A. Oh, I have seen him on several occasions but I have only had a conversation with him twice.

Q. On each time you have seen him where has that been? [62]

A. 424 East 15th Street and 422 East 15th Street.

Q. Has he been there at the premises?

A. Yes, sir.

Q. By himself or with someone?

A. He was by himself.

Q. You stated on two occasions you had a conversation with him? A. Yes, sir.

Q. Do you recall when your first conversation with Mr. Toobert was?

A. Yes, sir. It was at 422 East 15th Street in the home of Mrs. Patrick. He came in to use the telephone.

(Testimony of Berdie Mae White.)

Q. When was this?

A. That was about in—let's see; about April of 1946.

Q. You say he came in to use the phone?

A. Yes, sir.

Q. And what was said?

A. Well, Mrs. Patrick was complaining about her screens being torn down, and she said, she remarked to him that we was paying \$40.00 and he should fix the screen or something like that. And he said, well, he would see about it; he was going to fix up all the houses later on.

Q. Is that essentially all that you can recall at this time?

A. That is all I can recall there at her home.

Q. You say you had another conversation?

A. Yes, sir; I did.

Q. Where did that take place?

A. In my home, the upper front at 424 East 15th Street.

Q. And in reference to time when did that occur?

A. That must have been—I think it was about in March of 1946.

Q. Was that before this other conversation?

A. Yes, sir; that was before this other conversation.

Q. The one you had with Mr. Toobert at your home was before this one? A. Yes, sir.

Q. At Mrs. Patrick's home? A. Yes, sir.

Q. Who was present at that time with Mr. Toobert? A. My husband and myself.

(Testimony of Berdie Mae White.)

Q. Do you recall what Mr. Toobert said at that time, if anything?

A. Yes, sir. He came in and looked at the house. We was trying to paint it. We had bought some Kemtone and was going over the walls. And I remarked to him, "It seems like you all could paint the house, we are paying so much rent, paying \$40.00." And he said, "Well, I am going to fix them all up." He looked around. He wanted to see how they looked. He came out on the porch and in the kitchen [64] and examined them. I think he went next door.

Q. Did he just happen along or did he come in with any express purpose? Did he state why he came?

A. Well, he said he wanted to see what kind of condition they were in, if I make no mistake.

Q. Did Mr. Hammond ever give you receipts for rent?

A. No more than that piece of paper.

Q. I am talking about Mr. Hammond now.

A. Jack Hammond?

Q. Yes.

A. Yes, sir; just that piece of paper that time.

Q. Oh, you are talking about that piece of paper that you do not have any more?

A. Yes, sir.

Q. That you received when you first rented the place? A. Yes, sir.

Mr. Hirst: I believe that will be all.

Mr. Downing: No questions.

(Testimony of Berdie Mae White.)

Cross Examination

By Mr. Sinclair:

Q. What date was it that you first went down to the office of the Housing Expediter?

A. I can't recall the correct date, but I know it was sometime in July.

Q. May we see the money order or something you have [65] for this \$40.00 you paid Mr. Hammond?

A. I never said I paid him \$40.00 in a money order. I mailed him \$16.00 a month after I went to the OPA.

Q. How did you pay this money?

A. The \$16.00.

Q. No; not the \$16.00.

A. Or the \$40.00?

Q. Yes. A. Cash money.

Q. You paid it in cash? A. Yes.

Q. Was there anybody present upon any of those occasions that you paid \$40.00 to Mr. Hammond? A. Oh, surely.

Q. Well, who? Will you tell us who was present?

A. Well, several times Mrs. Davis and some others several times that I paid him.

Q. As a matter of fact this \$40.00 was given in part for rent and part for something else, isn't that right?

A. No. It was given him for rent was all.

Q. Maybe I am confusing you by this broad definition of rent. You paid \$40.00?

(Testimony of Berdie Mae White.)

A. Each month for rent.

Q. At that time did Mr. Hammond explain to you that part of that was for rent and part of it was for something [66] else?

A. No; he didn't.

Mr. Sinclair: All right; that is all.

Mr. Hirst: Your Honor, counsel has asked that question and I wish he would be specific as to what that something else is that you allege that you may have received.

The Court: I do not know. It is a form of question, I believe. He said it was something else.

Redirect Examination

By Mr. Hirst:

Q. Did you receive any additional services of any kind?

A. No; I haven't received any service at all, no kind of additional service. He did come out and put a coat of paint on the outside of the house and fixed some steps, you know, to the upstairs house, and he put some cement on the steps, and he asked for 15 more dollars for that.

Q. But no regular services? A. No.

Q. Or other kind of furnishings?

A. No, sir.

Mr. Johnson: May I ask this witness just a question or two?

Cross Examination

By Mr. Johnson: [67]

Q. In April you began paying your rent to Mr. Hall, is that correct? A. Yes, sir.

(Testimony of Berdie Mae White.)

Q. And why did you start paying your rent to Mr. Hall?

A. Well, Mr. Hammond said that he was busy doing some contracting work or something and he didn't have time to come by and collect this rent.

Q. And thereafter you just paid your rent to Mr. Hall? A. Yes, sir.

Q. At this meeting that you referred to when he raised the rent was Mr. Hall present at that meeting?

A. I don't think so. I am not positive.

Q. Do you remember of him at any time discussing the raising of the rent?

A. Mr. Hall?

Q. Yes, Mr. Hall. A. No; I don't.

Mr. Johnson: I think that is all.

The Court: That is all.

Mr. Hirst: Call Mrs. Davis next, please.

ETHEL DAVIS,

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Ethel Davis. [68]

Direct Examination

By Mr. Hirst:

Q. Where do you live, Mrs. Davis?

A. 424 East 15th Street.

Q. With particular designation, what part of that address do you live in? A. Upper rear.

(Testimony of Ethel Davis.)

Q. Upper rear. Who occupies that with you, anyone? A. My husband and myself.

Q. Is your husband here with you?

A. Yes; he is.

Q. Do you recall at this time when you first moved into the apartment there?

A. I moved in December the 24th in 1945.

Mr. Johnson: I can't quite hear the witness, if your Honor please.

Mr. Hirst: Please speak up, Mrs. Davis.

A. I moved in in December 24, 1945.

Q. With whom did you make your rental arrangements for the rental of that particular apartment?

A. October 16, 1945 I paid Mr. Hammond \$10.00 deposit and the apartment was vacant the 24th of December in 1945.

Q. You paid him a \$10.00 deposit in October, is that right?

A. Yes. And on the 24th I paid his wife the other [69] \$30.00, for which she gave me a paper for a receipt there.

Q. Do you recall the conversation you had with Mr. Hammond when you rented this place? Did he tell you how much the rent would be?

A. Yes; he told me \$40.00 a month.

Q. I show you this brown scrap of paper, Mrs. Davis. Is this the \$10.00 receipt that you received from your deposit?

A. From Mr. Hammond. Instead of 16th it is the 22nd, but he wanted the rent day on the 16th.

(Testimony of Ethel Davis.)

Q. I show you now—

A. This Jack Hammond.

Q. —a white sheet of paper. Is this the receipt for the balance of the \$40.00? A. Yes; it is.

Q. Is that the receipt Mrs. Hammond gave you?

A. Mrs. Jack Hammond.

Mr. Hirst: I will offer these two receipts as Plaintiff's Exhibit 7 next in order.

The Court: Admitted.

Q. By Mr. Hirst: Did you receive any more receipts from Mr. Hammond after that time?

A. No. He say he didn't give a receipt—period. He told me he don't give a receipt—period. I said, "You have to give me something to show that I paid my money." [70] He said, "Give me a book and I will put the month," the day I paid it on, but he didn't put like \$40.00 to January 16th until February the 16th.

Mr. Sinclair: Are we going to have those books offered in evidence, counsel?

Mr. Hirst: There are not any books; they are just papers. Your Honor, may I ask the witness?

(Counsel conferring with the witness.)

Q. I first show you this small sheet of paper with lines on it and ask you if those are the notations that were made each month when you paid your rent? A. Surely.

Q. And by whom were they made?

A. Well, January 16th Mr. Hammond—

Q. What year does that represent?

A. 1946.

(Testimony of Ethel Davis.)

Q. All right; go ahead, please.

A. On February 16 I paid Mr. Hammond, in 1946; and in April 16 in 1946 I paid Mr. Hammond; May the 16, 1946 I paid Mr. Hammond.

Q. In other words, in those spaces where there are signatures or initials, those were paid to Mr. Hammond? A. Yes; it is.

Q. Is that the handwriting of Mr. Hammond or whose is it? [71] A. Yes; it is.

Q. As to the balance, there are initials in some instances "W. H.", and in others "W. E. H." Whose names does that represent?

A. Mr. William E. Hall.

Q. Did he place the signature there himself?

A. Yes; he did.

Q. Did you on each occasion where there was a notation added every month, was that in response to payment by you of \$40.00 a month?

A. Yes; it was.

Q. Now directing your attention to the second sheet here, the larger size, unlined sheet of paper which contains some notations beginning in January, 1947, is your testimony the same as regards that sheet?

A. January the 16th until February the 16th paid \$40.00 to Mr. Hall; February to March paid \$40.00 to Mr. Hall. Here where it says "paid for March \$40.00", Mr. Hall, there is his signature there. "Paid for April W. E. H." is Mr. Hall; May, Mr. Hall, \$40.00; June paid Mr Hall \$40.00; July, \$40.00 to Mr. Hall.

(Testimony of Ethel Davis.)

Q. That is in Mr. Hall's handwriting, is it?

A. Yes; it is.

Mr. Hirst: I offer both these exhibits as one, Plaintiff's Exhibit 8 next in order. [72]

The Court: Admitted.

Q. By Mr. Hirst: Mrs. Davis, you mentioned that you went to the OPA in July, 1947.

A. Yes.

Q. Do you recall anything that occurred immediately prior to your going to the OPA?

A. In July, 1947, Mr. Hall comes up. He says, "Mr. Hammond say everybody be at meeting downstairs in my apartment at 7:00 o'clock." I was there. So he wanted to go up to \$50.00 a month. So he asked me did I want to pay the 50? I says, "No." I says, "Because I think I am paying too much at 40 now." He says, "Well, those that don't want to pay the 50 can do what they want to do, the best thing to do." That is what he told me. So, after then, after I checked on my rent, it was \$12.00 a month.

Q. Who made those statements that you have just testified to? A. Mr. Hammond.

Q. I see. Was this at the meeting that they were made? A. Yes; it was.

Q. After that what did you do?

A. Well, after that I went to the OPA.

Q. And after that with reference to paying your rent what did you do?

A. Well, when I went there and they told me I was [73] paying over ceiling—

(Testimony of Ethel Davis.)

Q. No. Don't state what they told you at that time, but just what did you do after you went to the OPA?

A. I mailed him his rent, which was \$12.00 a month.

Q. To whom? A. To Mr. Hammond.

Q. And has that been true ever since?

A. Yes; it has.

Q. Was that true of last month, on the 16th of March—this month, I should say?

A. I paid at that time until the 16th of March and I haven't paid my March because I have a slip "Mary G. Davis" and I don't know who to pay my rent to.

Mr. Sinclair: I don't see the purpose of this. What has that got to do with it, your Honor, raising the rent?

Mr. Hirst: We will skip that.

Q. Were you ever present when Mrs. Berdie Mae White paid her rent? A. Yes; I was.

Q. Do you recall at this time any specific occasion on which time you were present?

A. I was present, I think it was February, 1947.

Q. February in 1947? A. I think it was.

Q. What happened at that time? [74]

A. Well, I seen her pay Mr. Hall.

Q. What? A. \$40.00.

Q. How was it paid, in cash or check or what?

A. Cash.

Q. Did Mrs. White get a receipt for it?

(Testimony of Ethel Davis.)

A. Well, I didn't see her with any after she paid it.

Q. You actually saw the money change hands, did you? A. I sure did.

Mr. Hirst: That is all.

Cross Examination

By Mr. Sinclair:

Q. Mrs. Davis, you say you saw Mrs. White pay Mr. Hammond some money?

A. Yes; I did.

Q. What date was that, again?

A. I didn't say the date. The month of February, 1947.

Mr. Hirst: That is Mr. Hall she is talking about.

Mr. Sinclair: Mr. Hall. I beg your pardon. I thought you mentioned Mr. Hammond. I will withdraw that question.

Q. Mrs. Davis, those notations that were made here, how much did you give Mr. Hammond each time that you paid that money? A. \$40.00.

Q. I see. Can you explain why on these notations [75] "\$40.00" is on the receipt and on here it is not, or vice versa?

A. Mr. Hammond say he doesn't give receipts.

Q. I see.

A. He said when he wrote that "\$40.00".

Q. In other words, your testimony is that he made this out and appended his initials to it?

A. He did that.

Mr. Sinclair: No further questions, your Honor.

(Testimony of Ethel Davis.)

Mr. Downing: No further questions.

Mr. Johnson: I would just like one or two questions, if your Honor please.

Cross Examination

By Mr. Johnson:

Q. Mrs. Davis, in referring to this document. Exhibit No. 8, can you tell us the first or will that refresh your memory as to the first time that you paid rent to Mr. Hall?

A. March the 16 in 1946.

Q. And you paid rent to him then through what month?

A. He skipped two months, April and May to June.

Q. Who did you pay that to in April and May?

A. Mr. Hammond.

Q. That was in 1946?

A. Yes. It was from June on I pays Mr. Hall \$40.00 a month. [76]

Q. And when did you make your last payment to Mr. Hall? A. July, \$40.00, in 1947.

Q. That is July of 1947? A. Yes.

Q. How did you happen to start paying your rent to Mr. Hall?

A. Mr. Hammond came up and said he did not have the time to pick the rent up; and he says "for you all to pay Mr. Hall from now on."

Q. This meeting that you referred to was Mr. Hall present at that meeting?

A. No; he was not.

Q. Did you have any discussion with Mr. Hall about the raising of the rent?

(Testimony of Ethel Davis.)

A. No. He came up once and told me that Mr. Hammond said, after he paint the steps and put some cement downstairs at the bottom step and he put two cement steps down there, he said, "Mr. Hammond says everybody pay \$15.00." And I said, "\$15.00." He said, "Yes." I said, "I can't pay \$15.00." He said, "Well, that was my orders."

Q. And you never did pay this extra 15?

A. I sure didn't.

Mr. Downing: That is all.

Mr. Sinclair: One further question. [77]

Q. The work of this cement construction, Mrs. Davis, was this done before you moved in or after you moved in? A. What do you mean?

Q. I mean this painting and this substantial cement construction, the steps, and so forth?

A. It was after I moved in, but the steps doesn't connect on with my apartment because it is downstairs and I live upstairs.

Q. In other words, they put a staircase or steps up to your place?

A. Just put a step up on the back. I don't know who it was to.

Mr. Hirst: Your Honor, there are a couple of questions that I intended going into on direct and I forgot to do that. I ask leave of the court at this time to ask the questions.

The Court: All right.

(Testimony of Ethel Davis.)

Further Direct Examination

By Mr. Hirst:

Q. Mrs. Davis, have you ever seen Mr. Toobert before today? A. Yes; I have.

Q. Do you recall on how many occasions you have seen him? A. A couple of times.

Q. And on each time where did that take place?

A. Well, I seen him downstairs. I didn't have a conversation with him downstairs, but in October in 1946.

Mr. Downing: I can't hear, please.

A. In October, 1946 he came upstairs and he says, "I am the owner and I want to look the place over. I am going to have some repair work done on it." And I says to him, to Mr. Toobert, "In the kitchen the back glass it broken out." And I said, "My apartment is supposed to be furnished but it is unfurnished." And I said, "Which you know that we are paying \$40.00 a month." He said, "Well, I can't do anything about that," he said, "but if you want to buy the property," he say, "I will give you a nice bargain on it."

Q. Is that the gist of the conversation as you recall it at this time?

A. Sure. I think he gave me his address at 1417, I think it is, Kelman Avenue and he gave me his name.

Q. Kelman, K-e-l-m-a-n?

A. And he told me if I wanted to buy the property to see him at that address.

Mr. Hirst: That is all.

Mr. Downing: No questions.

Mr. Hirst: Mrs. Felder, please. [79]

LEANA FELDER,

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Leana Felder.

Direct Examination

By Mr. Hirst:

Q. Mrs. Felder, where do you live?

A. 4603 Staunton.

Q. Do you know Mrs. Ethel Davis, the woman who was just on the stand? A. Yes; I do.

Q. Are you any relation to her? A. No.

Q. Were you ever present on any occasion where Mrs. Davis paid her rent for the premises that she occupies on 15th Street?

A. Yes; I was.

Q. Do you recall specifically any occasion at which you were present?

A. In 1946, in January, on the 16th, when she first paid Jack Hammond, I was there then.

Q. You were there then. Did you see her actually pay the money to Mr. Hammond?

A. Yes; I did. I saw her count out the \$40.00 to him. [80]

Q. Who else was present, do you recall?

A. Just she and I and Jack Hammond.

Q. Where did that transaction take place?

A. 424 East 15th Street.

(Testimony of Leana Felder.)

Q. At her place? A. Yes, sir.

Q. Have you seen her pay it on any other occasion?

A. Yes; I did. I saw her pay Mr. Hall.

Q. Mr. Hall on other occasions. Do you remember at this time any particular transaction?

A. It was in April, in 1947, on the 16th.

Q. Where did that take place?

A. At her house, 424 East 15th Street.

Q. How much did Mrs. Davis pay Mr. Hall at that time? A. \$40.00.

Q. Was that in cash also? A. Yes.

Mr. Hirst: That will be all, your Honor.

Mr. Sinclair: No questions.

Mr. Johnson: No questions.

Mr. Hirst: At this time, your Honor, I wish to call Mr. Hammond as an adverse witness, your Honor.

The Court: All right; take the stand. [81]

JACK C. HAMMOND,

one of the defendants herein, called as an adverse witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Jack C. Hammond.

Direct Examination

By Mr. Hirst:

Q. Mr. Hammond, you have heard the testimony of the various witnesses that preceded you on the

(Testimony of Jack C. Hammond.)

stand to the effect that they paid you rent on a number of occasions. After they paid you the rent what did you do with it?

A. Well, I took \$18.00 of it and gave it to Mr. Toobert each month, and the other \$22.00 I put it aside until I had gotten enough to fix up those houses that wasn't in no living condition when I taken them over from Mr. Toobert.

The Court: I can't understand. Speak louder, please.

A. Yes, sir. I taken the \$18.00 of the money that they gave me and paid Mr. Toobert.

The Court: Mr. Toobert?

The Witness: Yes, sir. And the other \$22.00, I put it in those places to fix them up to live in. They wasn't in no condition to live in. They was condemned. And I told them, each, before they went in there that the property was not suitable for living, which it wasn't. So Mrs. Coleman, the first one asked me for the house, I told her as soon as [82] I got them in condition for living I would let her have one. So I couldn't seem to get enough money to do it, so I asked Mrs. Coleman if she would pay \$18.00 for the rent and pay \$22.00 a month, each month, more to get a repair of the house. She agreed to it. So I gave her not rent receipts, but I did give her a receipt to let them know they were paying \$18.00 for the rent and \$22.00 for fixing up the house.

So each one that came along and asked me for a place to stay, they all agreed to it that they were

(Testimony of Jack C. Hammond.)

willing to pay \$40.00, which was \$18.00 for the rent and \$22.00 for the repair to get those houses in order to live in. So I did, and after they was in there a while, then I got enough to start fixing them, of which I have all the bills here where I did the work on the houses and got them in living condition.

After they got in living condition, then I told them then to don't pay any more than the \$18.00 because they already had enough money paid on the place to get them fixed up. So they then paid \$18.00 after that. That was during the month of August, last year, but wasn't nobody in the places. I notice that this said "October", but there wasn't nobody there in October. The first person moved in there was Mrs. Coleman. She stated right at the time she went in there. She went in there in December. So in this case after December, then they all moved in and in order to straighten themselves out with the houses they did pay \$22.00 more to [83] make the \$40.00. So after that I furnished them all gas and light and water and furniture, and I have all the bills to prove where I did it. In place of the houses making me any money they got me in plenty of debt because I am not even finished paying for the work that was done on the houses. I put down concrete porches, concrete steps, plumbing and repairing all over the whole house, windows, screen, everything, because the houses didn't have none of them in them. Since that they broken them out again. I didn't never try fixing them any more be-

(Testimony of Jack C. Hammond.)

cause they just continue getting me in debt here, and I have bills here that I never have paid yet.

So I just told Mr. Toobert I would give the houses up because it is too much. I have a light and gas bill now that I have to pay, that has got my name on it. I haven't even paid that yet. I don't even have the money to pay them with. So therefore I just gave the whole business up in October.

The Court: Were you renting these apartments to these different people here yourself?

The Witness: Yes, sir.

The Court: You were renting them yourself?

The Witness: Yes, sir.

The Court: What did the other defendant have to do with it?

The Witness: Owner. Who?

The Court: Mr. Toobert. [84]

The Witness: Toobert, yes; he is the owner. I don't know, frankly speaking, if he is or not. I was renting from him.

The Court: You were renting from him and renting to these others, is that it?

The Witness: Yes. First, Mr. Toobert decided to sell me the place.

The Court: After that you rented, you said, to these other people?

The Witness: Yes, sir.

The Court: Did you spend all of that \$22.00 a month, as you say, every bit of it on improving these places?

(Testimony of Jack C. Hammond.)

The Witness: And more than that, because I am in debt now with it. All of that and more. I have had the plumber go over there twice and unstop the sink upstairs. I just ran out of money for the plumbers going up there. All of it went into it and more of my money. I even owe people money now what I borrowed from them to keep the places going. I even stopped from going to church because of it.

The Court: You didn't want to be stopped from going to church?

The Witness: I turned around several times because I was in anger on my way to church, to leave the house all messed up. The mess all run over out the hall, downstairs, in Mr. Hall's apartment. [85]

The Court: Is that before you went to church?

The Witness: Yes. I went back home. I didn't have no courage going to church.

The Court: You went back after without going to church?

The Witness: I couldn't go there that Sunday after I saw that mess all over the house.

The Court: You couldn't go to church?

The Witness: No, sir; because I wouldn't feel right inside.

Q. (By Mr. Hirst): You say you turned over the \$18.00 for each of these rentals to Mr. Toobert each month? A. Yes.

Q. Was that the rentals you were turning over? Did you understand that to be rentals?

A. That was the rent he charged me for it.

(Testimony of Jack C. Hammond.)

Q. You were renting the entire premises from Mr. Toobert, were you, for your own use?

A. Yes, sir. I was renting the big house first because I had an eviction to move and I didn't have no place to go. So after I took the big house I didn't move in it because we couldn't live in it. So I just put a club in there and then after the club I just rented it out to Mr. Hall and Mr. Hall started collecting the rent in February, 1946.

Q. He collected the rents for you, is that right?

A. Yes. [86]

Q. He turned the \$40.00 over to you each time?

A. Yes.

Q. How did you happen to determine to charge \$18.00 each for these apartments?

A. Well, I just told them that that was the rent.

Q. Did you check with the OPA first?

A. I did.

Q. Did you know that the rent on the apartment for the second floor rear at 424 East 15th Street was \$12.00 a month?

A. I knew about all of them but the downstairs at 424.

Q. But you charged 18 instead of 12 for that upper rear of 424, is that right?

A. That is right: I was collecting 12 for the rent and—

Q. Do you have—

The Court: Wait until he gets through. What did you say you were doing, collecting the 12 for

(Testimony of Jack C. Hammond.)

what? The Witness: For the rent.

The Court: And the rest of it for what?

The Witness: For the fixing up of the place.

The Court: For improvements?

The Witness: And the light and gas and water and so forth, furniture, I had all that to pay.

Mr. Hirst: Just a moment. [87]

Q. Did you go to the OPA before you started to rent these places? A. I did.

Q. Did you inspect the OPA rent registration statements? A. I did.

Q. These are the ones you inspected?

A. Yes, sir.

Q. I will call your attention to the fact that on each of these statements it states in item No. 2 "services" to be furnished.

You have already seen these, counsel.

Mr. Sinclair: Yes. I want to say, your Honor, that it is subject to our same objection that this is not properly before the court as the maximum rent for those premises.

The Court: Overruled.

Q. By Mr. Hirst: I call your attention to the fact that on each of these registration statements—I had better use the exhibits that are already in evidence—under the heading "Services" where it refers to interior and exterior repairs at the very bottom of the column on the right-hand side of the statement, it asks for the owner to "check the equipment and services included in the rent on March 1, 1942 or the most recent date you entered

(Testimony of Jack C. Hammond.)

in Section C.” Now, did you note that? You said you inspected it. A. No; not that. [88]

Q. Did you not inspect that part?

A. No; I didn’t inspect what the rent for—

Q. These were shown to you, were they not?

A. Just what they were rented for.

Q. The whole statement was shown to you. You were given a chance to look at it, were you not?

A. Well, that is on there with the rent.

Q. In other words, you did not bother to check that part of it as to whether you had the obligation to furnish the services or not?

A. No; I did not. I did not.

Q. When you were renting these places how much money did you turn over to Mr. Toobert in the aggregate? Did you turn it over depending on how much you took in or did you turn over a flat sum every month?

A. A flat sum every month.

Q. How much was that?

A. When I first taken that, I turned over \$150.00 to him every month for one year.

Q. You have been collecting the rent on these places right up to last month, have you not?

A. No, sir; I haven’t.

Mr. Sinclair: Objection to that, your Honor. The issue—

The Court: He says, “no.”

Mr. Hirst: That will be all, your Honor. [89]

(Testimony of Jack C. Hammond.)

Cross Examination

By Mr. Sinclair:

Q. Mr. Hammond, do you have any receipts or bills indicating what payments you made for this reconstruction business?

A. Yes; I have some of them.

Q. I first want to ask you this: When Mrs. Coleman moved in there, prior to the time she moved in did you have any agreement with her as to whether she would pay for this separate work to be done?

A. I did.

Q. Prior to the time that Mr. Jeffery Gassaway moved in did you have any agreement with him that he would pay for this separate work to be done?

A. All of them.

Q. Would your answer be "yes" if I asked you that for Mrs. Pearl Hildreth?

A. Yes.

Q. And Mrs. Ida Mae Patrick?

A. Not Mrs. Pearl Hildreth. I didn't even rent to her. I rented to Mr. Gassaway.

Q. How about Mrs. Berdie Mae White?

A. Yes.

Q. And Mrs. Ethel Davis?

A. Yes. [90]

Q. Is it your testimony that this agreement was a separate agreement as far as this reconstruction?

A. I wrote it down in each one in this book.

Q. In other words, this money that they did pay you, part of it was for rent and part of it was for this separate agreement?

A. Yes, sir. [91]

(Testimony of Jack C. Hammond.)

Cross Examination

By Mr. Downing:

Q. The rent registration statements, Mr. Hammond, which have been shown to you a little while ago relate to 422, 422 $\frac{1}{4}$, 422 $\frac{3}{4}$, 424 second floor rear, and 424 second floor [94] front at East 15th Street, just those five units. Now, the premises there include other living units besides these five, do they not? A. No.

Q. Is there a 422 $\frac{1}{2}$? A. Yes.

Q. All right; there is? A. Yes.

Q. And there is a ground story or first floor of the house known as 424, is there not?

A. Well, just the one you mentioned; yes, sir.

Q. Yes. And there are on the second story of 424 three separate units which you will rent to three separate tenants, are there not?

A. On the second floor only two.

Q. There are only two? A. That is all.

Q. Then the ground floor consists of the premises in which you live, is that correct?

A. Yes, sir.

Q. And you also maintain this club there, is that correct?

A. That is what it was, a club.

Q. How many rooms on this ground floor of 424? A. Five. [95]

Q. Is that all? Well, there is a five-room unit on the ground floor, and then there is a separate house, 422 $\frac{1}{2}$, which is not involved here in any overcharges? A. That is right.

(Testimony of Jack C. Hammond.)

Q. The amount which you paid to Mr. Toobert was originally \$150.00 a month, is that right?

A. For the first 12 months.

Q. And you and he had certain oral negotiations concerning that property before you took it over, didn't you? A. Right.

Q. What? A. That is right.

Q. And it was tentatively agreed that he would sell it to you and you would buy it from him for a total price of \$17,500, is that right?

A. That is right.

Q. And these payments which you made to him were originally made in pursuance of that agreement to buy and sell, is that right?

A. That is right.

Q. Your wife is named Octavia Hammond?

A. At that time, yes, sir.

The Court: When you rented these rooms to these different people that testified here were they to pay all their own gas and light themselves, outside of the rent? [96]

The Witness: No, sir; I paid for that.

The Court: They just paid for the use of the place, and then were they to pay independent of that for gas or light, electric light, or did they pay it themselves?

The Witness: In 422 and 422 $\frac{1}{4}$ and 422 $\frac{3}{4}$ paid their gas and light, but I paid the water, and 424 upper and top and ground floor I paid the gas, light and water.

The Court: Was that included in the rent or was that separate?

(Testimony of Jack C. Hammond.)

The Witness: That was included in the rent.

The Court: All right. What were they to pay, then, if anything, beyond the rent?

The Witness: All they was paying was the \$18.00 for the rental, and the \$22.00, as I say, went for that repair work.

The Court: I am speaking of this light and gas. Were they to pay that in the rent they paid you, or were you to pay it out of this rent?

The Witness: Yes; I paid it myself.

The Court: I mean was that your understanding with them that you would take care of that?

The Witness: Yes, sir.

The Court: You said next door about certain payment of gas and lights that you paid?

The Witness: Yes, sir. [97]

The Court: How much of it was included in the monthly rent that they were to pay?

The Witness: Yes, sir.

The Court: What did you pay in addition to this monthly rental, then? What did you do with that?

The Witness: I fixed the house.

The Court: That was not included in the rent, as you understand it. What was it? What did you do for this extra charge you were making?

A. Well, I paid the gas, light, water and everything for the houses. Besides that, I taken the responsibility on myself and got enough material, which was sand, cement, and so forth, to make concrete steps, concrete porches all around the entire

(Testimony of Jack C. Hammond.)

houses, and rat-proofing, which is why the Board of Health condemned it, and screened all around the houses. And then we put in new windows, new screens in the houses, such as walls and then paint them, and then we had the rubbish man to move out a whole yard, which ran to \$200 just to clean the tin cans and things up around the houses. And it was mostly condemned because I didn't have an incinerator and the inspector made me buy new incinerators, and so forth. I bought one and they said it was not enough and I had to buy two of the incinerators to burn trash. The windows were all out. I put in new windows in all the houses.

The Court: Can anybody live in there? [98]

The Witness: Oh, yes; they can live in there now. The Board of Health okayed it. But I told them before, the condition they were in, I couldn't rent them unless they come under that agreement. And they say they will agree to do that. Then after they moved in there I did that. We was getting along fine and I used to go by there Sunday, as I say, to see how they were getting along. But they were stopping up the toilets all the time.

The Court: You claim you had that agreement with them?

The Witness: Yes, sir; they all agreed with it.

The Court: Would you agree with them when they said it applied otherwise? They said it only included rent.

The Witness: They was probably trying to get something, but I am sure if they would tell the

(Testimony of Jack C. Hammond.)

truth, I am sure they would tell that the agreement was made up like that, because that was before the houses was repaired. I even repaired them before they even moved in there, and they moved in there with that understanding, because I made them all out a contract of paper and put in their books to that effect. I don't see why they didn't bring the books down. They tore out several. They wouldn't bring the whole book down because they know that is in the book.

The Court: Speaking of the book, did you make those entires in the book or did they? [99]

A. I made the contract in the book and give them each a book, but they tore out the pages.

The Court: Didn't you keep a copy of the contract? The Witness: No, sir.

The Court: You just turned it over to them?

The Witness: Yes, sir. Mr. Kelly, the plumber, he charged me \$40.00 every two weeks or so to go up and take this Kotex out of the toilet.

The Court: You were to keep up the place in good condition, the windows and all that?

The Witness: Yes. After they took possession I was to keep it up, but I had it understood it had to be in condition to rent. That is the reason I made out the contract to them, because it wasn't in condition in the first place to rent.

Mr. Sinclair: Shall I proceed, your Honor?

The Court: Yes.

Q. By Mr. Sinclair: So for about a year you paid Mr. Toobert \$150.00 each month?

(Testimony of Jack C. Hammond.)

A. Yes, sir.

Q. And then that sum was reduced by oral agreement between you and Toobert, was that right? A. Pardon?

Q. Then you and Toobert agreed that instead of \$150.00 you should only pay \$125.00, is that right?

A. That is right. [100]

Q. And at or prior to that time you had told him that you did not wish to continue with your plans to purchase the property, is that right?

A. That is right.

Q. And thereafter you paid him \$125.00 each month? A. Yes, sir; that is right.

Q. How long did that continue?

A. That continued up until—that continued up until entirely taken out of my care.

Q. You do not remember the last time you made the payment to Mr. Toobert?

A. About a month ago.

Q. What?

A. A month ago. The last payment I made to him was in February.

Q. You had never rendered any statement to him of the various rents you collected, did you?

A. No; I didn't.

Q. You did not. And you never rendered any statement to him of the various items of disbursement you had made about or in connection with the premises, did you? A. No, sir.

Q. You did not do that at all? A. No, sir.

Q. And you signed up for the water service.

(Testimony of Jack C. Hammond.)

A. I did.

Q. And the water was in your name?

A. Yes, sir.

Q. And the bills came to you?

A. Yes, sir.

Q. And you paid the water bills?

A. Yes, sir.

Mr. Sinclair: That is all. Your Honor, at this time in behalf of—

Mr. Hirst: I would like to ask one question, your Honor.

The Court: Are you through questioning this witness?

Mr. Sinclair: Well, yes, your Honor.

Mr. Johnson: No questions.

The Court: Very well. Let us get through with this witness.

Cross Examination

By Mr. Hirst:

Q. Are you still paying to Mr. Toobert \$125.00 a month?

A. No; I don't have any more to do with it.

Q. What happened last month? You paid up last month, you say?

A. Yes; I did.

Q. What did you do, turn it back to Mr. Toobert, the house?

A. Yes; I did. [102]

Q. As far as you know Mr. Toobert owns the house now, does he?

A. I didn't own it at first.

Q. You were buying it from him?

(Testimony of Jack C. Hammond.)

A. That is what he said. I never did get no written contract to it.

Q. No written agreement of any kind that you were purchasing it? A. No.

Q. And you never checked to see if Mr. Toobert was the owner or not? A. No; I didn't.

Q. You were just buying it—

Mr. Sinclair: If your Honor please, that is argumentative. The fact is under California law these parties were perfectly free to enter into an oral agreement for its purchase. There has been no testimony that he bought the property from Mr. Toobert, so I think it is immaterial, in fact, that counsel is alleging that there was this oral agreement. It is already testified—

The Court: In whose name does the legal title to this property stand?

Mr. Downing: I will stipulate—

The Court: You own the property?

Mr. Downing: —it did stand from June, 1945 until [103] September, 1947 in the names of Ewell Toobert and Marcella Toobert.

The Court: Then what became of it?

Mr. Downing: In September, 1947 Ewell Toobert and Marcella Toobert sold and conveyed the property and since have had no further interest in it.

The Court: To whom?

Mr. Downing: I don't know, offhand, your Honor. The Excell Realty Corporation nominally. I will state that I examined the county records during the

noon recess today and the records show those conveyances.

The Court: All right. [104]

Mr. Downing: If the court please, on behalf of the defendant Toobert I should like at this time to move for a dismissal under Rule 41, on the ground that the evidence is insufficient to establish any liability on his part in this; that there is no evidence from which an inference or reasonable deduction may be drawn that he was the principal and that Hammond was the agent.

The only evidence before this court indicates but to the contrary. Hammond collected the rent in and of his own right, and that he was either a vendee or a tenant of the defendant Toobert. I want to be very brief.

A second point is this: Counsel has denominated this action as different than a straight action for a money judgment based upon a receipt of overpayment of rent, but he calls it an equitable action for restitution.

Bearing that in mind, then, and bearing in mind the language of the Fifth Circuit in the case *Gordon v. Randolph*, decided January 20, 1948, which reads:

“Plaintiff asks for an order of restitution which, if granted, would be in its nature a mandatory injunction. It would resemble an order in bankruptcy to turn over property of a bankrupt to his trustee.”

In other words, it is in the nature of an action where there is a specific res or a specific thing or at

least a [111] specific amount of money in which the defendant has been unjustly enriched and which equity requires him to contribute to the plaintiff who has been unjustly deprived of it.

Now, the only evidence in this case shows nothing of that sort as to the defendant Toobert. We do not have before us ceiling rentals, maximum rentals as to the entire premises here involved. We have the maximum rental of five units. There are two further units as to which there is no evidence as to whether or not there was any maximum rent—not all premises require it—and that was what that maximum rent was. The only evidence is that Toobert received \$150.00 a month for about one year, thereafter about \$125.00 a month. There is no evidence that the money received by Toobert in the sum, first, of \$150.00, then later, in the sum of \$125.00 exceeded at all the maximum rentals on the premises.

The Court: What is that regulation referring to lessees or purchasers from the owners of property that is being rented?

Mr. Hirst: The lease with option to buy, your Honor?

The Court: Yes.

Mr. Hirst: I will read from the pertinent part, your Honor, of Section 2, subdivision (c), headed “Lease with Option to Buy,” and I will read from the last long sentence in the paragraph. It says:

“Where a lease of housing accommodations has been entered into on or after the effective date of [112] the regulation (or on or after Oc-

tober 20, 1942 where the effective date of the regulation is prior to that date) and the tenant as part of such lease or in connection therewith has been granted an option to buy the housing accommodations which are the subject of the lease, a landlord, prior to the exercise by the tenant of the option to buy, shall not demand or receive payment in excess of the maximum rent, whether or not such lease allocates some portion or portions of the periodic payments therein provided as payments on or after the option to buy.”

That is the section your Honor refers to.

The Court: What does your evidence show about the amount that he has received?

Mr. Hirst: I must admit, your Honor—

The Court: Of course, you have not introduced any evidence, only the witnesses, as to who owned this property, Toobert, and that on that basis that he had a lease there.

Mr. Hirst: The only evidence we have submitted, your Honor, in addition to that, is the testimony of various of these tenants.

The Court: Of course, the lessee and the owner had knowledge of these rent payments.

Mr. Hirst: He actually had conducted himself on the premises as an owner would do. In other words, he showed [113] interest in damage to the property and inspected the property; he made promise of certain repairs, which would be strictly within the realm of the operation of an owner, especially an owner, to keep it up in repair.

The Court: I will overrule that motion at the present time and let the evidence develop and see just what it develops with regard to the situation between Hammond and the owner. So you may proceed.

The Clerk: Motion denied now, your Honor?

The Court: Yes; denied now.

JACK C. HAMMOND,

a defendant herein, having been previously sworn, recalled as a witness in his own behalf, testified as follows:

Direct Examination

By Mr. Sinclair:

Q. Now, Mr. Hammond, with reference to this agreement that you testified to on cross examination, will you tell us what you did in pursuance of that? I might save time by telling you to limit your testimony, not to services like light, and so forth, but as far as this agreement to construct, remodel, and so forth, and tell the court what you have actually done or caused to have done.

A. Well, first, I installed windows.

The Court: You are speaking about an agreement with the tenants? [114]

Mr. Sinclair: Yes, your Honor.

The Court: All right; go ahead.

The Witness: Agreement with the tenants that they saw the condition of the houses.

Q. By Mr. Sinclair: Was the house fit for habitation?

(Testimony of Jack C. Hammond.)

A. No; it was not. That was the condition and then they wanted to live in them.

Q. Tell us what was done, Mr. Hammond. You have already been over the agreement. Now just tell us what was done in pursuance of that agreement.

A. First, I installed window panes, next, screened the windows, next, a porch, put a new porch on it because the porches were all broken down and several of them you could not even get in the house on account of the porch was too far down on the ground. So I put new cement porches, new cement steps in all of the courts. All of them had the same.

Q. Do I understand you completely tore out the old porch? A. Had to tear it out.

Q. You tore it out?

A. Old lumber. Yes; they were rotting down.

Q. It required substantial alterations, did it?

A. Yes.

Mr. Hirst: That calls for a conclusion, your Honor.

A. Yes; it did. And that was solid concrete porch [115] and solid concrete steps. And the lights, the wiring, and the doors and windows, and the rubbish around under the houses and in the yard. The incinerators and bathtubs and toilets. In other words, new plumbing in altogether in the entire house. Of course, I didn't have enough money to do that.

Mr. Sinclair: Just a moment now.

(Testimony of Jack C. Hammond.)

Q. With relation to Mrs. White or Mrs. Davis, the one that had the upstairs, she testified that you put stairs or something. A. Yes; I did.

Q. What about that; did you just repair the stairs that were there or what did you do?

A. I repaired the stairs and put concrete steps at the bottom of the stairs.

Q. Mr. Hammond, what amount or what price did you pay for this material, do you know? Do you have any receipts or have you an estimation?

A. Yes; I have a few. Yes; I estimate \$1,150.85.

Q. What does that represent?

A. That represents just the concrete porch steps.

Q. Is that the labor or just the materials that you bought for that?

A. I am not counting my labor.

Q. That is just the minimum? [116]

A. I am not counting the labor. I paid the other fellows for my help.

Q. As a matter of fact, Mr. Hammond, did you do some of that work yourself?

A. I did it myself.

Q. Are you a contractor and so forth?

A. Yes, sir; yes, sir. And, of course, I paid the help a dollar an hour. Three boys helped me.

Q. Mr. Hammond, did you contract for any additional services for your tenants? First, I will ask you this: Were you obliged by this previous rent regulation to perform any services about the house as far as your labor is concerned?

A. No; I was not.

(Testimony of Jack C. Hammond.)

Q. Were you required to do any cleaning?

Mr. Hirst: Your Honor, that calls for a conclusion and conjecture. It calls for a conclusion, but the registration itself is the best evidence of it.

The Court: I understand it.

Mr. Sinclair: I ask him to look at it, then, your Honor.

The Court: The regulation is the best evidence on that, unless he was notified or had some transaction otherwise with the regulation people.

Mr. Sinclair: All right.

Q. Now, Mr. Hammond, did you have any separate agreement to perform any extra or excess services or something [117] with the tenants?

A. No.

Q. I believe you testified, if the reporter will bear it out, that you did something under the house or something.

A. Yes. I put down some four-inch soil pipes under the house.

Q. And the other pipes have been merely repaired, or did you replace them only?

A. I had to replace four that were busted.

Q. Just one last question, Mr. Hammond. Let me see if I understand your testimony. The houses were not inhabitable before you had this agreement with the tenants, is that correct? A. Yes, sir.

Q. In other words, to get a place to live they agreed to pay you this money to rehabilitate the premises, is that correct? A. Yes.

Q. Is that the testimony you are wishing this court to understand? A. Yes, sir.

(Testimony of Jack C. Hammond.)

Q. Is that substantially what was done?

A. Yes, sir.

Q. That you merely paid out the money for those things? A. Yes, sir. [118]

Q. Was that work done in pursuance of that agreement? A. Yes, sir.

Mr. Sinclair: That is all.

Cross Examination

By Mr. Hirst:

Q. You state that all these premises at the time that the different tenants rented them were not fit for habitation? A. No, sir; they was not.

Q. You didn't do anything ahead of time to put them in a condition to be inhabited, is that right?

A. No, sir; I didn't.

Q. They moved in and then you did this work afterwards? A. Yes, sir.

Q. You state that on each case with reference to all those tenants that testified, that you had a previous understanding that everything over \$18.00 was to help you improve the property so they could live there, even though they were already living there? A. Yes, sir.

Mr. Hirst: That is all.

Mr. Sinclair: That is all, your Honor; no further questions.

The Court: You are excused.

Mr. Sinclair: Just one more thing, your Honor. I don't know whether the court wants those files, etc., in evidence. [119] I thought perhaps counsel

(Testimony of Jack C. Hammond.)

would cross examine on that. Do you think it proper at this time to introduce the receipts and bills?

The Court: That is for you to decide. You are trying the case.

Mr. Sinclair: I don't want to needlessly waste the time. Well, that is all right, your Honor.

Mr. Downing: Will you take the stand, Mr. Toobert? Oh, excuse me. Do you have any further testimony?

Mr. Sinclair: No.

EWELL TOOBERT,

a defendant herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Ewell Toobert.

Direct Examination

By Mr. Downing:

Q. Mr. Toobert, you are one of the defendants in this case? A. Yes, sir.

Q. You own the premises referred to in this testimony here as 422-424 East 15th Street, Los Angeles, California? A. Yes, sir.

Q. Did you buy that property, that is, you together with your wife? [120] A. Yes, sir.

Q. And when did you buy it?

A. It was recorded on the second day of June, 1945.

(Testimony of Ewell Toobert.)

Q. And thereafter did you have any conversation with Jack Hammond?

A. After that, in about a month later, I believe it was in July sometime, I got in contact with Mr. Hammond and I told him I will sell him the property for \$17,500, no down payment, \$150.00 a month. He came down and looked over the property. He says, "I will take it." I says, "Well, give me \$150.00." He says, "I will give it to you 30 days later. I haven't got it right now." Mr. Hammond will state that. From there on he paid me every month. Regardless, I didn't have nothing to do with the collecting. I never knew what he collects.

Q. That is all right. That is fine.

A. About a year—

Q. Was anything said by Jack Hammond as to how he wanted the property to be taken, whether in his name or in his wife's name?

A. To be taken in the name of Octavia Hammond.

Q. Octavia Hammond?

A. Octavia Hammond, and she was not here. She was in Texas. We drew up a contract but we never signed it, expecting her to come, and we dropped everything until about a year. [121] And then I told Mr. Hammond that I want him to pay this insurance. He says he is not going to go through with the deal, in a nice way. He says, "I will tell you what I will do, Mr. Toobert, if you want me to. I will pay you \$125.00, which is the OPA ceilings, and I will collect, myself, and I might

(Testimony of Ewell Toobert.)

move in, myself. I will need a home, and then I have some relatives that are coming from Texas. If I have a vacancy, I will be able to put them in." This will be to his benefit. He never made any statement to me about expenses on the income from the house. I never knew anything about it.

Q. Did you ever ask him?

A. I never asked him.

Q. It was not any of your business?

A. No.

Q. And thereafter, for approximately one year, then, it was about \$150.00 a month?

A. That is right.

Q. And thereafter you received \$125.00?

A. \$125.00 a month. That is it exactly.

Q. Did he ever render any statements to you covering receipts on that property?

A. No; nothing at all, because I had nothing to do with it. I had nothing to do with that. He paid me promptly.

Q. Did he ever notify you of any vacancies?

A. No, no; nothing at all. [122]

Q. You did visit the premises occasionally, did you not? A. I did, sir.

Q. Do you recall an occasion when there was a small fire there? A. Yes, sir; I went there.

Q. And there was insurance on that loss and it was adjusted, is that right?

A. Adjusted, right. That is the only one time that the tenants knew that I am the owner.

Q. Did you ever pay the water bills for the premises? A. No.

(Testimony of Ewell Toobert.)

Q. Or any utilities bills?

A. No, not even the first bill.

Q. Did you ever sign up for the water or any other utilities?

A. No, sir. Evidenced by the water and power company, my name was never on there.

Q. How long did you continue to own the property, you and your wife?

A. We had it since June the 2nd, 1945 until September the 5th, 1948.

Q. You mean 1948 or 1947?

A. '47, that is right. '48 isn't here. 1947. I am sorry. [123]

Q. And since that time you have had no interest in the property?

A. No. Since that time I have had no interest whatever. I sold it to Realty Investment Corporation, which is of record September the 5th.

Q. Did you cause a fire insurance policy to be taken out on a portion of that property?

A. Yes, sir. Then I had to cancel it.

Q. Now, just a minute. I will direct your attention to this instrument, Milwaukee Mechanic's Insurance Company policy No. D80549, issued January 22, 1946. Was this policy produced here in court today and delivered to you and to me by the office employee of the mortgagee of this property?

A. Yes, sir.

Q. The mortgagee is R. E. Allen?

A. R. E. Allen; that is right.

(Testimony of Ewell Toobert.)

Q. You do not have possession of this policy?

A. No.

Q. Did this secretary turn it over?

A. Yes; he turned it over to give him back.

Mr. Downing: Now, if the court please, the only materiality of this is to show that the insured includes Octavia Hammond under this policy.

The Court: It is proper to show it to counsel.

Mr. Downing: Yes; I did, I think, a while ago. Do you want to see it again? The mortgagee would like to have it returned. I wonder if I can read that portion into the record?

The Court: Yes; you may read that portion.

Mr. Downing: The instrument I have already referred to reads: "In consideration of the stipulation herein named and of the forty-five and fifty-one hundredths dollars premium the Milwaukee Mechanic's Insurance Company does insure Octavia Hammond, Ewell Toobert and Marcella Toobert for the term of three years from the 22nd day of January, 1946 at noon to the 22nd day of January, 1949, at noon against all loss or damage by fire, except as hereinafter provided, to an amount not to exceed \$7,000 of the following described property while located and contained as described herein and not elsewhere, to-wit: This policy covers the following described property located at 422, 422½, 422¼, 422¾, and 424 East 15th Street, Los Angeles, California."

That is the only material portion of it. Now, that is all.

(Testimony of Ewell Toobert.)

Cross Examination

By Mr. Hirst:

Q. When you first made arrangements with Mr. Hammond here to rent the whole premises or to purchase—

A. Yes; I sold it. That is right. [125]

Q. —to purchase the premises on a payment of \$150.00 per month—

A. At \$17,500, to pay \$150.00 a month, no down payment.

Q. —did you, or did Mr. Hammond go with you, at all to the OPA office? A. No.

Q. File any statement?

A. No. I turned over, right as we agreed, I turned over the slips from the OPA. I says, “Now, this is yours and take care of it.”

Q. What slips are you referring to, Mr. Toobert?

A. I am referring to the OPA registrations.

Q. Copies of these registrations here?

A. Exactly, exactly.

Q. I will let you look at them again just to be sure. Are these the ones here?

A. These are the ones; yes, sir.

Q. Did you state anything to Mr. Hammond in connection with the turning over of those documents?

A. I turned them over. I says, “Here is the OPA registration slips and from now on it is yours.”

Q. Did you go to the OPA office? A. No.

(Testimony of Ewell Toobert.)

Q. To find out if you were entitled to charge him \$150.00 or not? [126]

A. No; I did not go.

Mr. Downing: Just a minute. May I move to strike that answer out for the purpose of an objection?

The Court: You may object. Proceed.

Mr. Downing: The objection is made on the ground that the question assumes that the OPA had any right to impose any restriction upon the amount which he might charge upon the sale of the property; and further, upon the fact there isn't any evidence here to indicate what the maximum rental was on all this property.

The Court: Overruled.

Q. By Mr. Hirst: You state you did not go?

A. No, sir.

Q. Did you send Mr. Hammond to find out if that amount was proper?

A. No. Where there is no down payment paid, so this was the arrangement.

Q. Every month that Mr. Hammond paid you that money in what form did he pay it to you?

A. Cash.

Q. He paid it to you in cash?

A. That is right.

Q. Not by check or money order or anything else? A. No.

Q. Did you give him any receipt for that money?

A. I didn't give him. We were just waiting until she will sign the contract, Mrs. Octavia, and

(Testimony of Ewell Toobert.)

then we will draw it and I will give him acknowledgment of the money that he paid then. I have never missed a month.

Q. That first arrangement was made in July of 1945? A. 1945.

Q. But he was to buy it for \$17,500, is that right? A. Sir?

Q. That first arrangement to purchase it was in July of 1945, is that correct?

A. That is right.

Q. And the understanding was at that time that the name of the title holder would be Octavia Hammond? A. Exactly.

Q. And you were waiting for her to come out here from Texas? A. That is right.

Q. And she didn't come out from Texas, did she? A. I don't think so.

Q. You don't think so? A. I don't know.

Q. But you continued to accept the \$150.00 a month for a full year from him?

A. A full year from him on account of that purchase price. [128]

Q. Without giving him any kind of a receipt whatever for the money?

A. No; I didn't. No.

Q. Is that the way you do business generally?

A. That is not the way I do business, and I didn't give him no receipt. He didn't ask me for no receipt and I didn't give him no receipt.

Q. Isn't it a fact that you were operating this property yourself and that you put Mr. Hammond in there as agent? A. No.

(Testimony of Ewell Toobert.)

Q. As he has admitted in his answer on file in this case?

A. No. That cannot be because I didn't do it.

Q. You did not do it?

A. No, sir. And Mr. Hammond will not say that because he will not—

Q. After the year was up and you took \$150.00 a month from him—

A. That is right.

Q. —how much did you charge him after that first year? You charged him \$125.00?

A. \$125.00. He told me this was the OPA ceilings and he will pay me \$125.00. I agreed with that.

Q. How many rental units are there there? [129]

A. Well, there is four houses at one place and then there is a five rooms and downstairs, and was a three-room apartment and two-room apartment and a single room, as far as I can recollect.

Q. Do you recall, in addition to that visit that you went to Mrs. Hildreth's apartment after the fire and stated that you were the owner at that time—

A. That is right.

Q. —do you recall of having gone out there on other occasions and making any similar statements?

A. No. Later I went with a prospective buyer. I also offered Mrs. Davis, in case she wants to buy it, I will give her a reasonable down payment.

Q. Do you know when that was? A. No.

Q. You don't remember when that was?

A. No; I don't remember.

Q. Was it in 1947 or '46?

A. Must have been in 1947.

(Testimony of Ewell Toobert.)

Q. In 1947? A. In 1947.

Q. What part of 1947?

A. About the first part.

Q. First part of 1947?

A. About the first part of 1947. [130]

Q. You were offering to Mrs. Davis?

A. I cannot recall exactly, but it was—

Q. Well, what is your best recollection?

A. It was—I cannot remember exactly, but I remember that I offered her.

Q. Can you state whether or not it was in the month of October, 1946?

A. October, 1946; it might have been. I don't think so. No; it must have been later.

Q. And how much later than that?

A. I am quite sure that was in '47 but I wouldn't swear to that.

Q. You were not sure what part of 1947?

A. No; I am not sure, but I know that was in 1947.

Q. Was it the first half of 1947?

A. Oh, yes.

Q. Are you sure of that? A. Surely.

Q. All right. At the time you talked to her you identified yourself as the owner; isn't that a fact?

A. That is right.

Q. And you told her that if she would like to buy the apartment she was in you would be glad to sell it to her? A. That is right.

Q. You left her an address where she could reach you? [131] A. That is correct.

(Testimony of Ewell Toobert.)

Q. Isn't it a fact that, at the same time, you were receiving \$125.00 a month from Mr. Hammond pursuant to this oral arrangement for purchase?

A. No. The purchase was \$150.00.

Q. I am talking about the latter part of the time.

A. This \$150.00 was on the purchase price. Then after he had said he was not going through with the deal, he said, "I will pay you, if you want me to I will pay you \$125.00. The only benefit I will have is I have some relatives coming in from Texas and if I have a vacancy I can put them in it."

Q. He cancelled the purchase agreement, did he?

A. Exactly.

Q. And from that time when you started receiving \$125.00 it was merely as a lease arrangement?

A. Merely as a lease. And he told me also that any time you say I will give it up.

Q. Do you have any financial interest whatever in the Excell Real Estate Corporation?

A. No, sir.

Q. Does your wife have any interest in it?

A. No, sir.

Q. Are you a director or officer?

A. No, no, no; nothing at all.

Q. You did not know that these people were paying [132] \$40.00 a month for apartments?

A. No; I didn't know.

Mr. Downing. Just a minute. Objected to as immaterial.

The Court: Overruled. He said he didn't know.

(Testimony of Ewell Toobert.)

Q. By Mr. Hirst: You said you didn't know?

A. I didn't know.

Q. You heard Mrs. Davis testify that she called your attention to that fact?

A. I had nothing to do with it. If she called my attention, I had nothing to do with it; she had to talk to Mr. Hammond. I never received the rent. I never know what he was getting. I can swear to it.

Q. Did you talk to Mr. Hammond?

A. What?

Q. Did you talk to Mr. Hammond at all after he had talked to Mrs. Davis?

A. Have I talked to him? I don't remember whether I did. I don't remember.

Q. Did you ever have occasion that you talked with him as to whether or not he was complying with the OPA law in charging rents?

A. No, no. I knew he was going to take care of it.

Mr. Hirst: I think that is all, your Honor.

Mr. Downing: There is one further question.

Redirect Examination

By Mr. Downing:

Q. Mr. Toobert, are you familiar with the installation of certain concrete and cement work in the premises there?

A. If I am familiar with it?

Q. Yes. A. Yes, sir.

Q. About when was that work done?

A. That work was done either in '46 or in the beginning of '47.

(Testimony of Ewell Toobert.)

Q. After the work was done did you have anything to do with the paying for it?

A. If I had nothing to do—

Q. I asked you if you did have anything to do with paying for it? A. Yes, sir; I paid it.

Q. You paid it? A. Yes, sir.

Q. Do you know the amount of that?

A. I paid it because at that time I applied for a bigger loan and they withhold a thousand dollars for me to do certain work.

Q. You mean the party from whom you were seeking to get a loan on the property required the work done? A. R. E. Allen, the same one.

Q. And then you caused the work to be done and paid for it, is that it?

A. Exactly. He has got that receipt for it.

Mr. Downing: That is all.

Recross Examination

By Mr. Hirst:

Q. In other words, this work that Mr. Hammond has testified he did was done pursuant to your instruction, wasn't it, in order to comply with the requirements of this loan company?

A. I don't know.

Q. Well, that was the work which you are referring to, the cement work which he did, etc.; that was the work which you paid for?

A. That was the work that I paid for.

Q. That was not the work that you paid for?

A. That is the work that I paid for.

(Testimony of Ewell Toobert.)

Q. Was it done under your direction or did he do it? A. No; that was on the price agreed.

Q. You agreed with Mr. Hammond that he was to do it, to be a certain given price?

A. Right.

Q. How much was that price?

A. It was—I don't recollect how much it was but it was over a thousand dollars. [135]

Q. It was over a thousand dollars. You stated it was either the latter part of '46 or the first part of '47? A. Yes, sir.

Q. How did you happen to negotiate for him to do the work? Did you go to him or did he come to you? A. Well, I went to him.

Q. Just tell us what your arrangements were with him. A. I went to him.

Q. All right; what did you tell him?

A. That I have to do this and this work.

Q. What did you tell him you had to do? Essentially, what was the principal work?

A. Well, it had to be done. The foundation had to be made and porches had to be rebuilt.

Q. That is the principal work?

A. And put in some steps in the front and in the back.

Q. What else did you tell him, as meaning what else did you tell him had to be done?

A. And then painted the houses outside with two coats of paint.

Q. Did you ask him to do it or did he offer to do it? A. Offered to do it.

(Testimony of Ewell Toobert.)

Q. What did he offer to do it for?

A. That is what I don't remember, how much it was. [136]

Q. He did not offer to do it for nothing, did he?

A. It was over a thousand dollars. The receipt, Mr. Allen has got the receipt, because he withheld a thousand dollars until I will have this work complied with, and then he sent out his inspector and it was okayed, and then they brought him a bill and then he gave me the money.

Q. Mr. Allen is the mortgagee?

A. He is 229 South Broadway.

Mr. Downing: Is it south or north?

The Witness: North Broadway; R. E. Allen.

Q. By Mr. Hirst: When did Mr. Hammond complete the work? How long after you told him or asked him to do it or he offered to do it did he complete it?

A. It took him about two months.

Q. Did he do it himself or did he hire men to help him? A. He hired, hired people.

Q. Did you pay him all at one time?

A. No.

Q. Or did you pay him in installments?

A. No; I paid him. I paid him a part, then I paid him the balance. It was all paid in full.

Q. Did you instruct him to charge the tenants more money? A. No, sir.

Q. In order to pay off this thousand dollars?

A. No, sir. No, sir; I never mentioned it or anything. He didn't mention it to me and I didn't mention it.

(Testimony of Ewell Toobert.)

Q. You never mentioned it to him?

A. He didn't mention it to me and I didn't mention it to him.

Q. Actually, he was not putting up any money himself?

A. Well, I wouldn't say that he didn't put up some on some other occasions. He spent some money there and then he paid the utilities.

Q. That was when he was under contract to buy the place, though? A. Yes.

Q. Once he became the lessee there he didn't put any more money in himself?

A. No. He just kept on paying the utilities.

Q. I am talking about improvements to the property.

A. No. I didn't pay nothing except just when I raised the mortgage and they required that.

Q. You paid him in full, did you?

A. Yes, sir.

Mr. Hirst: That is all.

Cross Examination

By Mr. Sinclair:

Q. Mr. Toobert, as a matter of fact that paint was paid for at the North Broadway street address, and this little item [138] of lumber bill which is signed by Jack Hammond's invoice made out to you, was that in addition?

A. No; that was included.

Q. Oh, I see; that was included.

A. That was included.

(Testimony of Ewell Toobert.)

Q. Now, can you give us the names of any other people that you bought materials from?

A. I didn't buy none. I had nothing to do with the buying part.

Q. In other words, Mr. Hammond—

A. Mr. Hammond, whatever he spent that was his business.

Q. That is what I wanted to bring out. That is all from this witness.

A. In fact, on this bill, I didn't charge this bill to Mr. Hammond. I paid this bill also. I think I have.

Q. You paid this? A. Yes.

Q. You paid the paint bill at North Broadway?

A. I think I paid it. I believe I paid it but I couldn't say definitely. Maybe he paid it.

Mr. Sinclair: That is all.

The Court: That is all.

Mr. Hirst: Just one question:

Q. Actually, you did not purchase any of the materials? A. No. [139]

Q. You left that up to him but you paid for it?

A. That is it exactly.

Mr. Hirst: That is all.

The Court: You referred to turning over to Mr. Hammond certain OPA papers. What were those?

The Witness: Those are the registration copies.

The Court: Did you turn them over to him?

The Witness: Yes, sir.

The Court: When did you do that?

The Witness: When we made the deal I turned them over to him.

(Testimony of Ewell Toobert.)

The Court: You knew what they were, then, at that time?

The Witness: Yes, sir.

The Court: When you turned them over to Hammond he knew what they were?

The Witness: I turned them over to him.

The Court: What were those papers?

Mr. Hirst: These are photostats of them, your Honor. I showed the witness so he was certain that they were the ones. I might advise the court that under the regulations, when the registration is originally filed with the agency, the then landlord receives back a landlord's copy of that registration. This is the official one that is left with the agency. The agency keeps the original and the present tenant at that time also gets a copy, so there are actually [140] three. It is in triplicate. The regulation makes it a further duty on the landlord that if he transfers the property, that he transfer also all the records relating to maximum rents, including the registration statement.

The Court: And those are the ones he said he turned over. All right; anything further?

Mr. Downing: That is all.

Mr. Sinclair: Just one question:

Q. Mr. Toobert, do you know what the total price, the total costs of the improvements were for this property? Do you know what the total price for the improvements were?

A. What we agreed on.

Mr. Downing: What improvements?

(Testimony of Ewell Toobert.)

Mr. Sinclair: That he has been relating.

Mr. Downing: Do you mean the bills he paid?

Mr. Sinclair: For all of the improvements. He stated he did not pay some of them, counsel, and I want to know if he knows what the total price was of all the improvements on the place.

Q. Do you know?

A. At this occasion when he took this contract, that is what I paid him. It was over a thousand dollars. That included the work and the materials. It wasn't itemized.

Q. How did you pay it, in cash or what?

A. In cash. [141]

Q. Did you get a receipt? A. Sir?

Q. Did you get a receipt from him?

A. Yes, sir; I got a receipt.

Q. Do you have that receipt?

A. I haven't got it but I can produce it. Mr. Allen has got the receipt; and, in fact, I took this, a copy, and I turned it in to my income tax man. I had to have that receipt.

Mr. Sinclair: That is all.

Mr. Downing: That is all.

Mr. Sinclair: I will call Mr. Hammond for a few rebuttal questions.

Mr. Downing: That is all on behalf of the defendant Toobert.

Mr. Sinclair: I will call Mr. Hammond for a question in rebuttal.

The Court: All right.

JACK C. HAMMOND,

a defendant herein, called as a witness in his own behalf, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Sinclair:

Q. Mr. Hammond, with reference to these improvements [142] how much did Mr. Toobert turn over to you? I mean did he give you a thousand dollars? A. No.

Q. How much was it that he did turn over to you?

A. He gave me \$300.00. He took me down to borrow some money and he co-signed, but he gave me merely \$300.00 and he paid this one bill here.

Q. How much is that bill?

A. You mean this one?

Q. Yes.

A. This one is 30.80, five gallons of thinner and five gallons of paint.

Mr. Sinclair: All right. That is all, counsel.

Mr. Downing: That is all.

Mr. Hirst: That is all.

The Court: That is all. You are excused.

Mr. Hirst: Your Honor, I have got a line-up of witnesses. That is all except for this line-up of witnesses there. I can call each one of them to testify to the same thing, namely, that there was no such arrangement made with these people. Your Honor, we did not know at the time what that other service was supposed to be. That is why I inter-

(Testimony of Jack C. Hammond.)

rupted. If you think the record is sufficiently clear, I will not call them.

The Court: No, I am not going to pass on this record [143] now. That is up to you lawyers. You try your lawsuit and then I will pass on what you put in.

Mr. Hirst: I will call each of these witnesses.

Mr. Sinclair: Your Honor, I don't know whether that is proper rebuttal or not. When they came up on their testimony in chief I asked them if they had paid any amount of money for anything else and they said no. That is all they could testify to, now.

Mr. Hirst: I want them to testify to exactly what improvements he made to each of their individual apartments which he states was done.

The Court: I think that is proper.

Mr. Hirst: Also, your Honor, I want them to deny—

The Court: Never mind, now. Go ahead and call the witnesses.

Mr. Hirst: Mrs. Patrick, first.

IDA MAE PATRICK,

recalled as a witness by plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Hirst:

Q. Mrs. Patrick, when you first moved into the apartment at 422 the latter part of October or No-

(Testimony of Ida Mae Patrick.)

vember, 1945 was there any arrangement with respect to Mr. Hammond that any of the money which you paid him for rent, [144] to use that to pay for repairing the premises? A. It was not.

Q. There was no conversation at all, was there, as to that? A. No conversation to that effect.

Q. What, if anything, has Mr. Hammond done to repair your premises or your apartment since you have moved in there?

A. Only fixed the porch and steps.

Q. That is all?

A. Put a coat of paint on the outside.

Q. How many coats? A. One.

Mr. Hirst: One coat. All right; that is all. Mr. Gassaway.

JEFFREY GASSAWAY,

recalled as a witness by plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Hirst:

Q. When you rented the apartment at 4221 $\frac{1}{4}$ East 15th Street from Mr. Hammond was there anything said by Mr. Hammond with respect to part of the money that you paid to be used to repair the premises or to improve them?

Mr. Sinclair: If the court please, I am going to object. You have already ruled on the matter. You permitted him to [145] call these witnesses to testify

(Testimony of Jeffery Gassaway.)

to what was done. He is now going into matters touched upon in chief. I am going to object to it.

The Court: He has already testified in chief.

Mr. Sinclair: He has already testified.

Mr. Hirst: Your Honor, I would like to clarify this. As far as testifying in chief, we testified that all the money was for rent, yes, but the defense has injected a claim of defense here which I am going to totally eliminate from any consideration, and that is that there was some express understanding. We had no way of anticipating that the defendant would raise that. He did not do it in his answer and therefore I did not ask him any direct questions with regard to the arrangement, the rent arrangement.

The Court: Yes; you did. You asked if any of this amount that they paid for rent was for anything else and they said no; just for rent. Each one of them said so. So it is in the evidence. You have asked permission to offer rebuttal evidence as to whether or not they made any improvements and what they consisted of. I allowed you to go into that because you did not go into that in chief. You are limited as to that, but you have already had them testify about the other. Go ahead.

Q. By Mr. Hirst: What, if anything, did Mr. Hammond do while you were a resident there to improve the premises from the time you moved in?

A. Well, not anything while I was there.

The Court: Talk louder.

A. Not anything while I was there.

Mr. Hirst: All right; that is all. Call Mrs. Hildreth.

PEARL HILDRETH,

recalled as a witness by plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Hirst:

Q. From the time you moved in, Mrs. Hildreth, to the premises there at 422 $\frac{1}{4}$, what, if anything, did Mr. Hammond do to improve the premises?

A. Nothing but fix the porch and the steps. That was last May. Of course, my windows are all out of my house right now.

Q. Were they ever repaired by Mr. Hammond?

A. They have never been repaired. They are all out now, every window.

The Court: You said, "fix the porch." Just what did he do?

The Witness: Fixed the cement porch and steps and put a coat of paint on.

Q. By Mr. Hirst: Put a coat of paint on the outside of the house? A. In the front. [147]

Q. But nothing inside your place?

A. Nothing inside.

The Court: Did he do that in order to use the place, fix the porch and steps? Did that have to be done at that time?

The Witness: Well, the steps were torn down.

The Court: Torn down?

The Witness: Yes, sir.

(Testimony of Pearl Hildreth.)

The Court: How about the porch?

The Witness: Well, that was in bad condition also. You could trip on it.

The Court: Trip on it. All right; go ahead.

Mr. Sinclair: Just one question.

Cross Examination

By Mr. Sinclair:

Q. Mrs. Hildreth, as a matter of fact those screens and windows were put in by some family and they broke them out again.

A. No. There is no screens there. They are all torn up. There have been no new screens today in that house.

Mr. Sinclair: No other questions.

The Court: All right; that is all. Call your next witness. Hurry up.

Mr. Hirst: Mrs. Coleman. [148]

(Testimony of Ernestine Coleman.)

ERNESTINE COLEMAN,

recalled as a witness by plaintiff in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Hirst:

Q. At 422³/₄ East 15th Street, Mrs. Coleman, as to Mr. Hammond, what, if anything, has he done to repair or improve the premises since you have moved in there?

A. He fixed the steps, concrete steps, and put a coat of paint on the outside?

(Testimony of Pearl Hildreth.)

Q. How about inside your place?

A. I done that. I improved that myself. I painted, myself, on the inside.

Q. Has he done anything to the windows and screens? A. No.

Mr. Hirst: All right; that is all.

Cross Examination

By Mr. Sinclair:

Q. Mrs. Coleman, when you first moved in were any of these people living there?

A. I beg pardon?

Q. When you moved into this place was Mrs. Patrick, Mrs. Hildreth, or any of the others now in the court living there?

A. No. It was white owned then. I was the first one [149] moved into the court.

Mr. Sinclair: Okay.

Mr. Hirst: Mrs. White.

BERDIE MAE WHITE,

recalled as a witness by plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Hirst:

Q. What, if anything, Mrs. White, has Mr. Hammond done to improve the apartment that you occupy?

A. Well, he painted the outside of the house

(Testimony of Berdie Mae White.)

and fixed the front steps.

Q. Anything inside your premises?

A. No.

Q. Windows, screens?

A. No. He fixed one window, you know, when that explosion was. Well, the window was cracked and he put another one in there, but there was an earthquake and it cracked and I still don't have no window.

Cross Examination

By Mr. Sinclair:

Q. Mrs. White, when you moved in there who was living there?

A. I beg your pardon?

Q. When you moved in the premises that you occupy [150] which of the other witnesses here today were also at those premises?

A. Mrs. Coleman.

Q. Is that all? A. That is all.

Q. And yourself? A. That is all.

Mr. Hirst: Mrs. Davis.

ETHEL DAVIS,

recalled as a witness by plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Hirst:

Q. In your apartment at 424 East 15th Street what has Mr. Hammond done since you moved in to repair or to improve it?

(Testimony of Ethel Davis.)

A. He haven't done anything inside, but on the outside he did put one paint of coat, one coat of paint on the outside, and downstairs, the back stairway, on the way down at the bottom steps he put two little cement steps.

Mr. Sinclair: I can't hear you.

A. Downstairs at the back he put two cement steps at the bottom, and he painted the outside. He didn't do anything inside. There was already some there. There wasn't anything wrong with them when I moved there. There was [151] already some wooden steps there.

The Court: Could you use them?

The Witness: Yes; I could use them.

The Court: And he put two cement steps there?

The Witness: Yes; he did.

The Court: Is that all he did?

The Witness: That is all.

Cross Examination

By Mr. Sinclair:

Q. Mrs. Davis, when you moved in there each of these witnesses were also living in those premises?

A. Well, everybody that is here was there when I moved there, and downstairs—

Q. I mean just the ones that are concerned with this action. Were you the last of this group that moved in? A. No. Mr. Hall moved last.

Q. No; of the ones that are party plaintiffs.

Mr. Hirst: If I am correct, counsel, they are

(Testimony of Ethel Davis.)

not party plaintiffs.

Mr. Sinclair: I don't think that is improper, your Honor, because the witnesses—

The Court: Go ahead, go ahead.

Q. By Mr. Sinclair: Mrs. Davis, will you answer that question? Were all of these people that are now sitting over there that are tenants under this action, were they [152] living there at the time you moved in? A. Yes; they was.

Mr. Sinclair: All right; that is all. I want to thank you.

The Court: That is all. You are excused.

Mr. Hirst: That is all.

The Court: Any further evidence?

Mr. Sinclair: No, your Honor. That is all.

The Court: We will take a recess now until 10:00 o'clock tomorrow morning, at which time you may appear and argue and submit the case to the court.

Mr. Hirst: Thank you, your Honor.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m. of the following day, Tuesday, March 23, 1948.) [153]

Los Angeles, California,

Tuesday, March 23, 1948, 10:00 a.m.

The Court: I wish to state, counsel, before we commence argument, that while I do not want to hurry you, I have a case that they just brought in to me to try following this and today is the only day I have; so we should consume as little time as

we may in this argument. I am not trying to limit you, I want you to understand.

Mr. Sinclair: I think the facts are simple enough that it would not require a great deal of summation.

The Court: I do not want to hurry you; you understand that, but they just brought this case in here and wanted me to hear another case.

Mr. Hirst: As far as I am concerned, your Honor, if other counsel are willing, I will waive argument. Your Honor heard the case.

The Court: No; I want you to argue it. I want you to argue it because you have a question here of the application of the one-year statute. I want to hear you on it. I told them that I had this afternoon if I got through with this argument in this case.

You may proceed, then.

(Argument of counsel omitted from transcript.)

The Court: The first proposition to be considered here is whether or not this one-year statute of limitations applies [155] under the record before the court. We have two subdivisions of Section 205 of the National Act relating to renting and collecting of rent for living purposes. Under Section 205(a) Congress has set the power in the Administrator to regulate and fix maximum rents of premises which are to be used for living purposes. No provision of limitations whatever is stated in that section as to when the Administrator may maintain such an action.

We refer then to Section 205(e), which it is contended here by the defendant Hammond is applicable, providing a one-year limitation to bring actions. It will be observed from a study of that subdivision it relates to actions brought by the individual and not by the Administrator. There is a distinction, clearly and expressly, between those two subdivisions. One relates to the Administrator bringing the action, upon which no limitation by Congress is placed within which he must maintain his character of action. The other is a limitation of one year which relates to the person who is seeking, himself, in an action to collect the overcharges, and it provides for treble damages, if necessary, and attorney's fees.

Now, I gather from the remarks made by the Supreme Court in that Tenth Circuit Court of Appeals case that they are clearly informing us as to the distinction between these two sections; and whether they had or not, my judgment is [156] that they are different, separate, and distinct circumstances under which we must function in determining whether or not there has been an overcharge of the maximum amount made by law in renting premises for living purposes. I think they are separate and distinct. 205(e) does not apply here and there is no limitation to bringing this action by the Administrator.

Now we come to the next question: What does this evidence show as to whether there has been a violation of what we call a ceiling or maximum price of rent fixed by the Administrator on this

particular premises, regardless of who is the owner, regardless of who is operating it or who is collecting it or who has violated in collecting in excess of that ceiling price or maximum price. That is the spirit of this law.

Now, who was operating these premises when these people went in there to rent? The maximum rent was fixed by the Administrator at a maximum of \$18.00 a month, one at \$16.00 a month. Six of these people are involved here and set up in this complaint, and every one of them comes here and testifies that they were charged and they paid \$40.00. Those who paid \$40.00 a month which was imposed on them by these defendants up to a certain time, which I am going to refer to, functioned together and established liability up to a certain time, and then after a certain time, which I will [157] call attention to, Hammond kept on.

We find these people went there, they went in and they had been paying \$40.00 a month, and those who paid \$20.00 here, until I believe one month or so it was reduced. Hammond collected. Hammond says he bought the property on an oral agreement from Toobert, the real owner, who held the legal title, and therefore he was the owner and he is responsible. Toobert comes back and says, "No; I am not responsible. Hammond is responsible, although we have an absolutely void agreement to sell this property under the laws of California."

That is the purpose of the Statute of Frauds regarding the transfer of real property not in writ-

ing. That is the law, I suppose, of nearly every decision. I know it is in my home state up there, and I have held again and again that such transfers, not in writing, are void under the Statute of Frauds, and that was the purpose of it. So we are confronted here with a situation between these two defendants with regard to a transfer of this property. It does not make any difference whether he did transfer or not. The question is: What did he do. The question is: What did these two men do in dealing with these six tenants. They both exercised, without any question, control in the operation of those premises. They were over there working jointly up until, as I noted here on the evidence, September, [158] 1947. Thereafter Toobert walked out of the picture and Hammond functioned alone.

So that both are liable to these tenants for all the overcharges as set forth in this schedule in this complaint up until September, 1947, when they were working together, collecting the rents. Those defendants put in improvements. Every one of these six people testified that they had the understanding and told them they were paying nothing but rent, not to paint a house, not to fix up a window that is broken out, making it untenable, not fixing the steps or the porch. That is the duty of the party who rents, to keep those premises in living condition and the tenants do not have to pay them for it. You cannot avoid this law by saying: Oh, I had to make certain repairs to make it livable and therefore I deducted legally from these

overcharges. That is not the law and you cannot step around the law this way. If you did, you could never enforce the rent law at all.

They functioned there together. The legal title owner went there, saw these improvements being made and he was taking an interest in it. He turned it over to Hammond; Hammond was collecting the money; Hammond was to pay him so much money and paid him \$150.00 a month for a while and then he paid him \$125.00 a month. They were jointly working together and their tenants paid the bill, illegally, these [159] overcharges. That is the spirit of this law and that is what this evidence shows clearly. The preponderance of the evidence, gentlemen, upholds that conclusion in my mind.

Six people here came and said that when they rented it they said they were paying nothing but rent. Whether they were or not, it was the duty of those who are renting to those people to keep their place in tenable condition, and they can't deduct it from this illegal overcharge.

Now, I am not going to assess treble damages, but I am holding that both of these defendants are liable to these tenants for these overcharges set forth in this schedule which they have all testified they paid. Nobody has contradicted or said they did not pay it. Even these defendants who got the money, they do not deny that these six people paid it to them. I say they are both liable jointly until September, 1947, and thereafter Hammond conducted it alone and he is liable for the balance of it and costs. So you may prepare your findings

and present to me within five days from this date. You must remember there are no treble damages or no attorney's fees allowable here in this case at all, because I do not think it is warranted under this Statute. [160]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 30th day of June, A. D., 1948.

/s/ ALBERT H. BARGION,
Official Reporter.

[Endorsed]: Filed July 3, 1948.

[Endorsed]: No. 12030. United States Court of Appeals for the Ninth Circuit. Ewell Toobert, Appellant, vs. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellee. Transcript of Record. Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed September 1, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 12030

EWELL TOOBERT,

Appellant and Defendant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellee and Plaintiff.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY
ON APPEAL

Comes now the appellant and defendant Ewell Toobert and hereby states that he intends to and will rely on appeal on the points stated in his Statement of Points on which Appellant Intends

to Rely on Appeal filed in the District Court, Southern District of California, Central Division, and which statement is a part of the certified type-written transcript of record filed herein on September 1, 1948, being pages 51, 52, 53 and 54 thereof, and appellant hereby expressly adopts such statement as his statements of the points on which he intends to rely in the Circuit Court of Appeals.

Dated September 20, 1948.

/s/ GEORGE W. DOWNING, JR.,
Attorney for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed September 22, 1948. Paul P. O'Brien, Clerk.

No. 12030.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EWELL TOOBERT,

Appellant,

vs.

TIGHE E. Woods, Housing Expediter, Office of the
Housing Expediter,

Appellee.

APPELLANT'S OPENING BRIEF.

GEORGE W. DOWNING, JR.,

650 South Grand Avenue, Los Angeles 14,

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FILED

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PAUL P. O'BRIEN,

CLERK

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APPELLANT'S OPENING BRIEF.

I.

BASIS OF JURISDICTION.

A. District Court.

This is an action brought by the United States Housing Expediter to secure an injunction restraining defendants from collecting rent in excess of the lawful amounts under the Housing and Rent Act of 1947 (U. S. C. A. Title 50 App. Sec. 1881 *et seq.*) and to require restitution of rents previously allegedly collected in violation of that act and the Emergency Price Control Act of 1942 (U. S. C. A. Title 50 App. Sec. 901 *et seq.*), all of which appears on the face of the amended complaint [Tr. pp. 2-7].

Under Section 205(c) of the Emergency Price Control Act of 1942, and Section 206 of the Housing and Rent Act of 1947 jurisdiction of this action is expressly conferred on the District Court.

B. Court of Appeals.

The judgment rendered by the District Court [Tr. pp. 31-33] is clearly a final judgment, and jurisdiction is therefore conferred on the Court of Appeals to review the same by virtue of Section 128(a) of the Judicial Code (U. S. C. A. Title 28, Sec. 225) which provides that the Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions in the district courts.

II.

STATEMENT OF THE CASE.

During the period from June 2, 1945, until September 5, 1947, the defendant and appellant Ewell Toobert and his wife Marcella Toobert (who was not made a party to this action) owned the property described by street and number as 422, 422 $\frac{1}{4}$, 422 $\frac{1}{2}$, 422 $\frac{3}{4}$, 424 lower floor, 424 upper front and 424 upper rear, East 15th Street, Los Angeles, California [Tr. p. 132]. The evidence establishes without contradiction, and there is no dispute, that as to five of these seven units the actual tenant-occupants during varying portions of the stated period paid as rent sums in excess of the lawful maximum rents under the Emergency Price Control Act of 1942 and the Housing and Rent Act of 1947. So far as this defendant and appellant Ewell Toobert is concerned, there was

not in the District Court and there is not before this court any controversy as to:

- (a) The maximum rents on the five units in question; or
- (b) The amounts paid by the tenant-occupants of these five units in excess of the maximum rents, as set forth in the judgment [Tr. p. 32] and totalling \$2208.00.

The evidence does not show whether the remaining two units were or were not subject to maximum rents, or if so the amount of the maximum rents on these units; consequently, there is no way of ascertaining what the total maximum rent on the entire premises was. Such excessive rents were all paid to defendant Jack Hammond or defendant William H. Hall, the latter being a mere collecting agent for Hammond. At all of the times in question, Hammond was in complete management and control of the premises, first as a vendee under a contract to buy the premises from Toobert, and later upon the rescission of this contract as the tenant of Toobert. No part of the excessive rents was ever paid to or received by the appellant Toobert.

The case at bar is one brought by the Federal Housing Expediter to require, in the words of the prayer of the amended complaint,

“That the defendant be ordered and directed to tender to all available tenants as are entitled thereto a refund of all amounts in excess of the maximum rents established by the Emergency Price Control Act of 1942, as amended, and Regulations issued

thereunder, and/or the Housing and Rent Act of 1947, and Regulations issued thereunder, which were received by the defendant, his agents, servants, employees and attorneys from said persons as rent for the use and occupancy of the housing accommodations described in the complaint, since the date maximum rents were established therefore by (4) said Acts and said Regulations.” [Tr. p. 5.]

In addition to an order of restitution as thus prayed for, the plaintiff sought an injunction to restrain defendants from future violations of the Housing and Rent Act of 1947. It will be observed that neither of the statutes in question expressly authorizes an action by the Housing Expediter to compel a landlord to restore to the tenant rents collected in excess of the legal maximum; but in view of the majority decision of the United States Supreme Court in *Porter v. Warner Holding Co.*, 328 U. S. 395, 66 S. C. R. 1086, 90 L. Ed. 1332, the existence of such a remedy appears no longer open to question.

The appellant contends on this appeal that he did not, directly or indirectly, through an agent or otherwise, demand, collect or receive any of these excessive rents, that he was at no time the landlord of the tenants who paid these excessive rents, and that he cannot be called upon to refund that which he never received. In presenting this contention from the record, it will be stated in several different ways, but the basic issue remains the same: Was or was not the appellant Toobert the landlord of these overcharged tenants?

III.

SPECIFICATION OF ERRORS RELIED UPON.

1. That material Findings of Fact are not supported by the evidence as follows:

(a) Finding No. 5, to the effect that from July 13, 1945, to September 1, 1947, the defendant Ewell Toobert was the landlord of the premises designated as 422, 422 $\frac{1}{4}$, 422 $\frac{3}{4}$, 424 upper front, and 424 upper rear, East 15th Street, Los Angeles, California, within the meaning of said term as defined in the Federal Rent Regulations;

(b) Findings 7, 9, 10, 11, 13, 14, 15, 17, and 18, insofar as these findings relate to Ewell Toobert, and find that he was the landlord of the persons named respectively as rent-payers in said findings, and find that he demanded and received certain sums respectively as rent of the respective premises described in said findings.

2. That Finding No. 5, above referred to, is erroneous in that it is against the clear weight of the evidence.

3. That Findings 7, 9, 10, 11, 13, 14, 15, 17 and 18 are erroneous in that they are, and each of them is, against the clear weight of the evidence insofar as they relate to Ewell Toobert.

4. That the court erred in finding that the defendant Ewell Toobert demanded or received any over-maximum rents.

5. That the court erred in admitting hearsay evidence against the defendant Toobert over his objection.

IV. ARGUMENT.

SUMMARY. Appellant's argument can best be summarized by emphasizing that the overall issue in this case is the sufficiency of the evidence to justify the findings to the effect that Ewell Toobert was a landlord of the tenant-occupants and the findings that over-maximum rents were demanded and received by Toobert. These facts are the very crux of plaintiff's case, and we expect to convince the court that the record is completely and utterly lacking of evidence in support of such findings.

Specification of Error No. 1.

We contend that Finding No. 5 [Tr. p. 25], reading as follows:

"5. That for the period of time extending from July 13, 1945, to and including September 1, 1947, said defendants, Ewell Toobert and Jack Hammond, were the landlords within the meaning of said term as defined in Section 13(a)(8) of the Rent Regulation for Housing, and Section 1 of the Controlled Housing Rent Regulation, of the housing accommodations designated as 422, 422 $\frac{1}{4}$, 422 $\frac{3}{4}$, 424 upper front and 424 upper rear, East 15th Street, Los Angeles, California, and located within said Defense Rental Area, said accommodations being subject to said (31) Rent Regulation for Housing and said Controlled Housing and Rent Regulation." [Tr. p. 25.]

is wholly unsupported by the evidence. The term landlord is defined in identical language in the two regulations referred to in said Findings, as follows:

“Landlord includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing.”

And we contend that Findings 7, 9, 10, 11, 13, 14, 15, 17 and 18, of which we quote only Finding 7, as follows:

“7. That for the period extending from October 26, 1945, to August 26, 1947, exclusive of the period extending from July 1, 1946, to July 26, 1946, inclusive, defendants Ewell Toobert and Jack Hammond, as landlords, demanded and received from Ida Mae Patrick the sum of \$40.00 per month as rent for the use and occupancy of said housing accommodations located at 422 East 15th Street, Los Angeles, California; whereas, the maximum legal rent for said housing accommodations was the sum of \$18.00 per month, amounting to a total overcharge of \$462.00.” [Tr. p. 25.]

because the remainder are identical therewith except for the substitution of other names, dates, amounts and street numbers, and each of them is wholly unsupported by the evidence. The lack of evidentiary support for Finding No. 5 and the group of Findings 7-18 will be discussed together, for the reason that the subject matter is completely inseparable.

Each of the overcharged tenants testified. Each of them testified that he rented his apartment from Hammond and made his rental agreement with Hammond:

Ida Mae Patrick—Tr. pp. 49-50;

Jeffery Gassaway—Tr. p. 70;

Pearl Hildreth—Tr. p. 71-72;

Ernestine Coleman—Tr. pp. 75-76;

Berdie Mae White—Tr. pp. 81-83;

Ethel Davis—Tr. p. 94.

Each of them testified that he paid his rent to Hammond:

Ida Mae Patrick—Tr. p. 54, pp. 63-64;

Jeffery Gassaway—Tr. p. 70;

Pearl Hildreth—Tr. p. 71-72;

Ernestine Coleman—Tr. pp. 75-77;

Berdie Mae White—Tr. p. 84;

Ethel Davis—Tr. p. 96.

(There are six tenants, but only five apartments involved, Hildreth and Gassaway having occupied the same apartment at different periods [Tr. pp. 69-71].)

Most of them testified that he paid his rent at times to William H. Hall:

Ida Mae Patrick—Tr. p. 54;

Pearl Hildreth—Tr. p. 72;

Ernestine Coleman—Tr. pp. 76-77;

Berdie Mae White—Tr. pp. 85-86;

Ethel Davis—Tr. p. 96;

But William H. Hall was only the collecting agent for Hammond, and delivery of the money to Hall was merely payment to Hammond:

[Hammond's testimony, Tr. p. 109.]

And one tenant paid some rent to a Mrs. Dodson as a collector for Hammond and on Hammond's instructions [Testimony of Ernestine Coleman, Tr. pp. 77-78].

Four of these tenants testified to having had conversations with Mr. Toobert at one time or another, and we here quote in its entirety all of the testimony relating to such conversations:

PEARL HILDRETH:

Direct Examination.

"Q. Have you ever seen Mr. Toobert before?

A. Yes; I have.

Q. Will you describe the circumstances under which you first met Mr. Toobert? A. I had a fire in my home in 1946 on October 5th. Mr. Toobert knocked on the door and said he was the owner of the property. He came down with the insurance fellow to see about the damage that was done. I asked Mr. Toobert if he would fix the windows on the house. He had already had the house painted. He said he would get around to that later. I told him I was paying \$40.00 a month; I thought that ought to be enough; that he should fix the windows, which the windows haven't been fixed until yet.

Q. What did he say, if anything? A. Well, he and the insurance fellows began to talk, and he told me that he would have the windows fixed.

Q. Do you recall anything else that was said during that conversation? A. No; no more than he asked me and the fellow, the insurance fellow, do he think the place looked all right, and that is how we got around to the conversation about the windows and that was practically all." [Tr. pp. 72-73.]

Cross-Examination.

“Q. Mrs. Hildreth, you have seen Mr. Toobert, you say [45], only once before? A. No. I saw Mr. Toobert, he was at the place two or three times while it was being fixed.

Q. This was following the damages which were caused by fire? A. That is right.

Q. And he came down there with the insurance adjuster? A. And said he was the owner.

Q. And examined the portions of the building which had been damaged in that fire, is that right? A. That is right. Also, he came by to see the people that was working for him. He had working for him two fellows that done the work in the house.

Q. You mean this was in repair of some damages caused by the fire? A. That is right.” [Tr. p. 74.]

ERNESTINE COLEMAN:

Direct Examination.

“Q. Have you ever seen Mr. Toobert? [49] A. Several times.

Q. Under what circumstances have you seen Mr. Toobert? A. Well, only once he came to the house and looked around, you know, the yard, that he was going to repair the places, and then several more times he was in the court, you know, just looking over the property and houses and things, and I only come in contact with him once, myself, to talk to him.

Q. What was said at that time? A. He said he was just looking the place over; he was going to repair them and he was looking at my porch at the time, and he was on the steps, and he said, ‘They need a repair.’ And he was going to repair the places.” [Tr. p. 78.]

Cross-Examination.

“Q. When did you talk to Mr. Toobert? A. I don’t know. It was in the summer months in—

Q. What year? A. In 1946.

Q. The summer of 1946? A. Yes.

Q. Who else was present? A. No one. [51]

Q. Was that the first time you ever saw him?
A. No; that was not the first time I saw him.

Q. The first time you ever talked to him? A. Yes; that was the first time and the only time.

Q. Did you introduce yourself to him? A. No; I didn’t. I saw him. He was out around in the yard, looking over the place, and I went out. He said, ‘Well, I am just looking around to see what repair needs done on the houses.’” [Tr. pp. 79-80.]

BERDIE MAE WHITE:

Direct Examination.

“Q. Have you ever seen Mr. Toobert before to-day? A. Yes, I surely have.

Q. On approximately how many occasions have you seen Mr. Toobert? A. Oh, I have seen him on several occasions but I have only had a conversation with him twice.

Q. On each time you have seen him where has that been? [62] A. 424 East 15th Street and 422 East 15th Street.

Q. Has he been there at the premises? A. Yes, sir.

Q. By himself or with someone? A. He was by himself.

Q. You stated on two occasions you had a conversation with him? A. Yes, sir.

Q. Do you recall when your first conversation with Mr. Toobert was? A. Yes, sir. It was at 422 East 15th Street in the home of Mrs. Patrick. He came in to use the telephone.

Q. When was this? A. That was about in—let's see; about April of 1946.

Q. You say he came in to use the phone? A. Yes, sir.

Q. And what was said? A. Well, Mrs. Patrick was complaining about her screens being torn down, and she said, she remarked to him that we was paying \$40.00 and he should fix the screen or something like that. And he said, well, he would see about it; he was going to fix up all the houses later on.

Q. Is that essentially all that you can recall at this time? A. That is all I can recall there at her home.

Q. You say you had another conversation? A. Yes, sir; I did.

Q. Where did that take place? A. In my home, the upper front at 424 East 15th Street.

Q. And in reference to time when did that occur? A. That must have been—I think it was about in March of 1946.

Q. Was that before this other conversation? A. Yes, sir; that was before this other conversation.

Q. The one you had with Mr. Toobert at your home was before this one? A. Yes, sir.

Q. At Mrs. Patrick's home? A. Yes, sir.

Q. Who was present at that time with Mr. Toobert? A. My husband and myself.

Q. Do you recall what Mr. Toobert said at that time, if anything? A. Yes sir. He came in and

looked at the house. We was trying to paint it. We had bought some Kemtone and was going over the walls. And I remarked to him, 'It seems like you all could paint the house, we are paying so much rent, paying \$40.00.' And he said, 'Well, I am going to fix them all up.' He looked around. He wanted to see how they looked. He came out on the porch and in the kitchen [64] and examined them. I think he went next door.

Q. Did he just happen along or did he come in with any express purpose? Did he state why he came? A. Well, he said he wanted to see what kind of condition they were in, if I make no mistake." [Tr. pp. 88-90.]

ETHEL DAVIS:

Direct Examination.

"Q. Mrs. Davis, have you ever seen Mr. Toobert before today? A. Yes; I have.

Q. Do you recall on how many occasions you have seen him? A. A couple of times.

Q. And on each time where did that take place? A. Well, I seen him downstairs. I didn't have a conversation with him downstairs, but in October in 1946.

Mr. Downing: I can't hear, please.

A. In October, 1946, he came upstairs and he says, 'I am the owner and I want to look the place over. I am going to have some repair work done on it.' And I says to him, to Mr. Toobert, 'In the kitchen the back glass is broken out.' And I said, 'My apartment is supposed to be furnished but it is unfurnished.' And I said, 'Which you know that we are paying \$40.00 a month.' He said, 'Well, I can't do anything about that,' he said, 'but if you

want to buy the property,' he say, 'I will give you a nice bargain on it.'

Q. Is that the gist of the conversation as you recall it at this time? A. Sure. I think he gave me his address at 1417, I think it is, Kelman Avenue and he gave me his name.

Q. Kelman, K-e-l-m-a-n? A. And he told me if I wanted to buy the property to see him at that address." [Tr. p. 102.]

The foregoing is absolutely all that the record contains of any direct dealings, relationship, transactions or conversations between Toobert on the one hand and the tenant-occupants on the other.

It will hardly be necessary to cite authorities to the effect that the burden of proof rests on the plaintiff, nor to do more than state the fundamental principle that the relationship of landlord and tenant originates in contract, express or implied. It needs no argument to demonstrate that the foregoing testimony falls far short of proving Toobert the landlord of these tenants, or that he demanded or received any over-ceiling rents.

That Toobert occasionally visited the premises, was interested in their condition, was concerned about the fire damage and spoke also of making other repairs, is indicative of ownership or at least some interest in the premises, but it hardly proves, even *prima facie*, the landlord-tenant relationship between himself and the occupants. It is equally consistent with other theories, such as the correct one that he was the original lessor and Hammond the sub-lessor. However, we will dispense with further argument on this point, because on the trial appellant's

counsel himself expressly conceded the insufficiency of this evidence when on two different occasions he said:

“Mr. Hirst: Your Honor, I will admit that we have to tie up the defendant Toobert with the defendant Hammond.” [Tr. p. 62.]

and

“Mr. Hirst: As I stated before, I understand there is to be a link-up there with Mr. Toobert.” [Tr. p. 82.]

Appellant has diligently searched the remainder of the record and we can find no trace of any such “tie-up” or “link-up.” All further evidence offered, on the part of all parties, consists of the testimony of Jack Hammond (called both as an adverse witness and on his own behalf) and Ewell Toobert.

Mr. Hammond, called by the plaintiff as an adverse witness, testified, under interrogation by the court, as follows:

“The Court: Were you renting these apartments to these different people here yourself?

The Witness: Yes, sir.

The Court: You were renting them yourself?

The Witness: Yes, sir.

The Court: What did the other defendant have to do with it?

The Witness: Owner. Who?

The Court: Mr. Toobert. [84]

The Witness: Toobert, yes; he is the owner. I don't know, frankly speaking, if he is or not. I was renting from him.

The Court: You were renting from him and renting to these others, is that it?

The Witness: Yes. First, Mr. Toobert decided to sell me the place.

The Court: After that you rented, you said, to these other people?

The Witness: Yes, sir.” [Tr. p. 107.]

The witness at first stated that he paid Mr. Toobert \$18.00 from the monthly rent and gave it to Mr. Toobert [Tr. p. 105], but shortly thereafter corrected this and made clear that he paid Mr. Toobert a flat sum, irrespective of what he collected from the tenants:

“Q. When you were renting these places how much money did you turn over to Mr. Toobert in the aggregate? Did you turn it over depending on how much you took in or did you turn over a flat sum every month? A. A flat sum every month.

Q. How much was that? A. When I first taken that, I turned over \$150.00 to him every month for one year.” [Tr. p. 111.]

The witness testified that an oral contract existed whereby Toobert agreed to sell him the property, and that for the first 12 months he paid \$150.00 per month to Toobert pursuant to this oral contract [Tr. p. 114]; and that at the end of this time the oral contract was rescinded and he rented the premises from Toobert and paid \$125.00 per month as rent [Tr. p. 118]; that he never rendered to Toobert any statement of rents collected or expenses paid out upon the property [Tr. p. 118]; that he was required to pay certain utility bills of the tenants [p. 114] and that he signed up for the water bills himself and paid them himself [Tr. pp. 118-119]; that the operational repairs, such as plumbing, were done by him at his own expense [Tr. p. 108]; he said “I just

ran out of money for the plumbers going up there.” [Tr. p. 108.]

The defendant Toobert testified in substance that he and his wife acquired title to the property June 2, 1945 [Tr. p. 129], that about a month later he and Jack Hammond entered into an oral contract whereby he agreed to sell and Hammond agreed to buy the property for \$17,500, payable \$150.00 per month [Tr. p. 130], that the property was to be taken in the name of Octavia Hammond (Jack Hammond’s wife), and that a contract of sale between himself and Octavia Hammond was drawn up but never signed [Tr. p. 130], that Jack Hammond maintained the \$150.00 monthly payments to him for one year [Tr. p. 131]; that at that time he (Toobert) requested Jack Hammond to pay the insurance, and that Hammond replied that he was not going through with the purchase, whereupon the contract of sale was rescinded and he rented the premises to Jack Hammond for \$125.00 per month [Tr. pp. 130-131], and that thereafter Hammond paid him \$125.00 per month [Tr. p. 131]; that Hammond never rendered to him any statements covering rent collections on the property [Tr. p. 131]; that he at no time signed up for or ever paid the water bills which were the landlord’s obligation [Tr. pp. 131-132].

The fire insurance policy issued January 22, 1946, covering the entire premises was produced, and a portion of it read in evidence showing that the insured under the policy were Octavia Hammond, Ewell Toobert and Marcella Toobert [Tr. pp. 132-33].

Now the appellant has not thus recapitulated the testimony of Toobert and Hammond because any need rests on us to prove affirmatively that Toobert was not the landlord (*i. e.*, the landlord of the complaining occupants).

The plaintiff has the laboring oar. In this, as in any other civil action, the burden of proof rests on him. It is incumbent on him to establish by substantial evidence the ultimate facts recited in the findings under attack. We have cited the testimony of Toobert and of Hammond so that it might be examined to ascertain if there can be there found that necessary proof of agency, admittedly, in the words of appellee's counsel, completely lacking up to that point; we have not cited it because any duty rests upon us to prove that Toobert was Hammond's vendor or Hammond's landlord. We are not trying to prove a case; we are trying to demonstrate that the plaintiff has not proved one.

Again we say, the question answers itself. There is nowhere in the testimony of Toobert or Hammond any shred or scintilla of evidence to the effect that Hammond was acting for Toobert, or authorized to act for him, in his (Hammond's) dealings with the tenant-occupants or his collection of rents from them. The promised "link-up" is still missing.

Two of the fundamental rights of a landlord—any landlord—are to sue his tenant for past due rent and to evict his tenant if the rent is unpaid. Measured by these criteria, where does Toobert stand with respect to the tenant occupants on the facts as shown by this record? If Berdie Mae White failed to pay her rent when due, could Toobert have sued her for the money or maintained eviction proceedings against her? If so, on what facts? It is for the appellee to answer these questions.

We leave this portion of the argument with the citation of *Ricks v. Corak*, 65 Fed. Supp. 960 (East Dist. Penna.), which, while only the decision of the District Court, presents facts virtually parallel to the actual facts as shown by the record in the instant case; and where the court holds squarely that in the absence of substantial evidence to show agency between the original landlord and the sublessor, that the original landlord is not liable for excessive rents paid by the tenant-occupants to the sublessor.

Specifications of Error Nos. 2 and 3.

We contend that Finding No. 5 and Findings Nos. 7, 9, 10, 11, 13, 14, 15, 17 and 18, so far as they relate to Ewell Toobert, being the same findings attacked under specification of error No. 1, and set out in full above at pages 6 and 7 of this brief, are against the clear weight of the evidence and should be set aside.

It is the law that the Circuit Court of Appeals in equity cases is not limited to the mere question whether there is any substantial evidence to support the findings, but may set them aside if against the clear weight of the evidence.

State Farm Mut. Automobile Ins. Co. v. Bonacci,
111 F. 2d 412.

Under this point we refer to our previous argument, and suggest that if in some manner or other there is any competent evidence to be extracted from this record to support these findings, that nevertheless the evidence preponderates so overwhelmingly against the truth of these findings that it is the duty of the appellate court to set them aside as against the clear weight of the evidence.

Specification of Error No. 4.

We contend that the court erred in finding that the defendant Ewell Toobert demanded or received any over-maximum rents.

Such a finding was made by the court and is found in Findings numbers 7, 9, 10, 11, 13, 14, 15, 17 and 18 [Tr. pp. 25-29]. These are the same findings, except No. 5, heretofore attacked; and under this specification we wish to make a different approach.

At this point we will look somewhat more fully into the nature of the cause of action under which judgment has been rendered against the appellant. We are here concerned with both the original rent control law, the Emergency Price Control Act of 1942, and its successor, the Housing and Rent Act of 1947, because excessive rents were here collected during the periods of active operation of both statutes. The original law authorized expressly two distinct civil remedies against the landlord for the recovery of rents unlawfully paid:

- (a) An action by the tenant himself; or
- (b) Under certain circumstances, an action by the Price Administrator.

Emergency Price Control Act of 1942, Sec. 205(e); U. S. C. A. Title 50, Sec. 925.

while the Housing and Rent Act of 1947 authorizes only the action by the tenant. (U. S. C. A. Title 50, Sec. 1895.) But this is neither an action by the tenants nor an action by the Price Administrator to recover the statutory penalty. In the words of the majority in *Porter v. Warner Holding Co.* (*supra*), 328 U. S. 395, 66 S. C. R. 1086, 90 L. Ed. 1332, "It may be considered as an equit-

able adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief" (p. 399). The relief sought, and the judgment here rendered, is not an ordinary judgment for the recovery of money, but a mandatory injunction directing the defendants to return monies which they have unconscionably collected; in the language, again, of the *Porter* case, it is "a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act" (p. 398). And the basis for such a decree lies not in any express statutory authorization, for there is none, but in the "inherent equitable powers of the District Court" (p. 398). See also,

Creedon v. Randolph, 165 F. 2d 918; and
Blood v. Fleming, 161 F. 2d 292,

where emphasis is laid on the purely equitable character of the relief sought.

It abundantly appears from a reading of the cases cited that this is a purely equitable action, and that any restitution order must be grounded on the familiar equitable principle of unjust enrichment. Now, then, we have a judgment of restitution against Toobert, and it becomes pertinent to inquire by what monies he has been enriched, and whether the plaintiff has established that any of that enrichment was unjust.

Toobert has been enriched by the receipt of \$150.00 per month from Hammond for 12 months, from July,

1945, to July, 1946, and by the receipt of \$125.00 per month from August, 1946, to September, 1947 [Tr. pp. 130-132]. But those sums were paid for the entire premises, namely 422, 422 $\frac{1}{4}$, 422 $\frac{1}{2}$, 422 $\frac{3}{4}$, 424 lower floor, 424 upper front, and 424 upper rear, seven units in all [Tr. p. 113]. It has been found (and this finding we do not question) that the maximum rents on five of these units aggregated \$82.00 per month [Findings of Fact, Tr. pp. 23-29]. But no evidence was offered and no finding was made as to the maximum rent (if any) on the remaining two units, namely, 422 $\frac{1}{2}$ and 424 lower floor. The former consisted of a separate dwelling house, and the latter was a five room apartment where Hammond lived and also operated a club [Tr. p. 113]. Toobert has been unjustly enriched only if the amount he received exceeded the maximum rent. There is, however, nothing to show what the total maximum rent was on the whole seven units collectively. It therefore does not appear whether the sum, first, of \$150.00 per month, and later, the sum of \$125.00 per month, did or did not exceed the aggregate maximum rental on the whole seven apartments.

Since under the theory of this action, the defendant is to be ordered to return only that which he unlawfully received, then surely, if this appellant is under any theory to be held liable, the case should be remanded for further evidence to establish the remainder of the maximum rents, so as to ascertain in what amount, if any, Toobert's receipts exceeded the lawful amount.

Specification of Error No. 5.

The court erred in admitting hearsay evidence against the defendant Toobert over his objection.

While Ida Mae Patrick, one of the tenant occupants, was on the witness stand the plaintiff attempted to elicit from her the substance of a telephone conversation between her and Jack Hammond which took place some six months after the last over-ceiling rent was paid. The record shows the following:

“Q. By Mr. Hirst: I will ask the witness, then, to state what conversation took place over the telephone with Mr. Hammond on this occasion that you refer to. What was the conversation?

The Court: Now, wait a minute. Do not answer until counsel have an opportunity to object.

Mr. Downing: To which we make objection on behalf of the defendant Toobert that the conversation is as to him pure hearsay, not binding upon him. Those are the objections.

Mr. Hirst: Your Honor, I will admit that we have to tie up the defendant Toobert with the defendant Hammond.

The Court: I will allow it, with such tying up, as you refer to it. If not, it would be hearsay. With that understanding, go ahead. You have got a situation here and I have got to receive the evidence the best way I can, and then we will size it up at the last as to what is admissible.

Q. By Mr. Hirst: What was the conversation, Mrs. Patrick? What did you say and what did he say? A. Well, he called over the phone and said that he would not be able to pick the rent up any more; that Mr. Toobert would pick up the rent himself hereafter. And I don't remember what day that

was or what date it was, but I know it was in the last four or five weeks ago.

Q. Was that all that was said? [31] A. Yes.

Mr. Hirst: That is all, Mrs. Patrick." [Tr. pp. 61-62.]

That such conversation was, as to Toobert, hearsay (although competent as to Hammond) hardly seems open to question; indeed, the trial court expressly, and counsel for the plaintiff impliedly, conceded it to be such. The testimony objected to is of little consequence, and we make this point merely to point out that even though the testimony objected to is unimportant, it is nevertheless incompetent and should be wholly disregarded.

Conclusion.

We feel that the court erred in rendering judgment against Toobert when the record is devoid of evidence against him, and that it should be reversed.

Respectfully submitted,

GEORGE W. DOWNING, JR.,

Attorney for Appellant.

No. 12,030

**In the United States Court of Appeals for the
Ninth Circuit**

EWELL TOOBERT, APPELLANT

v.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

BRIEF OF APPELLEE

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FILED

JAN 23 1949

PAUL P. O'BRIEN,

CLERK

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**In the United States Court of Appeals for the
Ninth Circuit**

No. 12,030

EWELL TOOBERT, APPELLANT

v.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This is an appeal by one of the defendants below from a final judgment of the District Court of the United States for the Southern District of California, Central Division, awarding restitution of rent overcharges collected in violation of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. Sec. 901, et seq.), the Housing and Rent Act of 1947, as amended (50 U. S. C. A. App. Sec. 1881, et seq.), and of the regulations issued pursuant thereto, the Rent Regulation for Housing (10 F. R. 13528) and the Controlled Housing Rent Regulation (12 F. R. 4331), respectively, in an action for restitution and other injunctive relief brought by the Housing Ex-

pediter pursuant to Section 205 (a) of the 1942 Act, as amended, and Section 206 (b) of the 1947 Act, as amended.

The material facts in the case are not in dispute. From June 2, 1945, until September 5, 1947, appellant was the owner of the premises located at 422, 422 $\frac{1}{4}$, 422 $\frac{3}{4}$, and 424 East 15th St., Los Angeles, California, in the Los Angeles Defense-Rental Area (R. 120). As such, the premises were subject until July 1, 1947, to the Rent Regulation for Housing issued under the 1942 Act and from July 1, 1947, to the Controlled Housing Rent Regulation issued under the 1947 Act.

Plaintiff charged that defendants Toobert, Hammond, and Hall had demanded and collected rents in connection with five of the housing accommodations at the particular premises in excess of the legal maximum rents in effect for the accommodations. A schedule of the tenants, the periods of their occupancy, the particular units, the maximum legal rents for the units, the excessive rents actually collected and the total amount of the overcharges was set forth in the complaint (R. 7). In his answer (R. 8), defendant Toobert denied the overcharges and further pleaded that the illegal rents, if any, had been collected prior to the one-year statute of limitations contained in Section 205 (e) of the 1942 Act.

At the trial all the overcharges as alleged were established by the testimony of the tenants (R. 49-104) and the collection of excessive sums from the tenants was not denied by defendants. Defendant Hammond's defense was that all of the monies collected by him from the tenants in excess of the maximum

legal rents were collected for the purpose of making necessary repairs and to pay utility charges pursuant to separate agreements with each tenant (R. 105-112). The tenants denied the existence of such agreements (R. 150-156) and plaintiff established in evidence by the official registration statements for the five units that the maximum legal rents for the units included the landlord's obligation to make interior and exterior repairs as well as to pay the utility charges (R. 110, 111). Defendant Toobert's defense was that he was not at any time during the period of the overcharges the landlord of the particular accommodations as a result of two successive agreements entered into by him and Hammond. Toobert testified that some time in July 1945 (R. 129, 130, 136) he entered into an oral contract of sale with Hammond for the premises for the sum of \$17,500 with no down payment but calling for monthly payments of \$150.00 (R. 130, 131, 134); that the agreement was in effect for approximately one year during which Toobert was paid \$150.00 per month by Hammond (R. 131); that upon the termination of the oral contract of sale, a second arrangement was entered into by the same defendants consisting of an oral lease of the same premises at a monthly rent of \$125.00 which Toobert received each month from Hammond (R. 130, 131, 137); and that on September 5, 1947, Toobert disposed of the properties by sale to the Realty Investment Corporation (R. 132). At the conclusion of the trial, the District Court stated its opinion as follows:

(a) That the one-year statute of limitations set forth in Section 205 (e) of the 1942 Act did not

apply to an action for restitution brought under Section 205 (a) of the 1942 Act (R. 158, 159);

(b) That the evidence indisputably established all of the overcharges as alleged by plaintiff (R. 160);

(c) That the oral contract of sale between Toobert and Hammond was void from its inception (R. 160, 161);

(d) That during the existence of the void contract of sale both Toobert and Hammond improved the properties jointly, worked together in the collection of the illegal rents, and exercised control in the operation of the premises (R. 161, 162);

(e) That the obligation to repair the premises was included in the maximum legal rents for the premises and to charge the tenant therefor was illegal and constituted overcharges (R. 161, 162); and

(f) That defendants Toobert and Hammond were both jointly liable for the overcharges collected until September 1947, the date when Toobert leased the premises to Hammond, and that Hammond was solely liable for the overcharges collected thereafter (R. 162).

The foregoing was incorporated into findings of fact, conclusions of law (R. 23), and into the lower Court's judgment (R. 31).

In this appeal appellant Toobert does not assign as error any of the District Court's findings as to the overcharges, but appellant admits that "The evidence establishes without contradiction * * * and there is not before this court any controversy as to: (a) the maximum rents on the five units in question; or (b) the amounts paid by the tenant-occupants of these

five units in excess of the maximum rents, as set forth in the judgment [Tr. p. 32] and totalling \$2,208.00'' (Appellant's Br., pp. 2, 3). Appellant complains only of those findings of the lower Court holding appellant to be the landlord of the premises (Appellant's Br., p. 5).

ARGUMENT

Contrary to appellant's contention, the lower court did not err in finding that defendants Toobert and Hammond were the landlords of the particular premises from July 13, 1945, through September 1, 1947, and, as landlords, demanded and received illegal rents

Appellant does not raise in this appeal any questions as to the propriety of the lower Court's findings of all of the overcharges as alleged by plaintiff, but freely admits their existence and establishment in the evidence (Appellant's Br., pp. 2, 3). Appellant does attack Findings of Fact 5, 7, 9-11, and 13-17 of the District Court insofar as they find that he was the landlord of the particular premises, together with defendant Hammond, during the period from July 13, 1945, through September 1, 1947, and participated in the collection of the admitted overcharges (Appellant's Br., p. 5). It is submitted that these findings are amply supported by the evidence in the case.

Before considering this evidence, the provisions enacted by the Congress in the 1942 and 1947 Acts, as well as those utilized by the Housing Expediter in the regulations effectuating the provisions of the two Acts, which establish and define the violations and the liabilities therefor, will be briefly discussed. These provisions are of the broadest scope, defining viola-

tions and liabilities in terms of *any person* who participates in their commission.

Section 205 (e) of the 1942 Act¹ phrases liability for statutory damages in terms of *any person* who demands or receives over-ceiling rents (*infra*, p. 14). Section 4 (a) of the 1942 Act does likewise.²

The identical approach is also used in the Regulation. Section 2 (a) of the Rent Regulation provides that “* * * *no person* shall demand or receive any rent for use or occupancy * * * of any housing accommodations * * * higher than the maximum rents provided by this regulation; and *no person* shall offer, solicit, attempt or agree to do any of the foregoing.” [Italics ours.] (*Infra*, p. 15.)

In addition, the definition of “landlord,” as contained in Section 13 (a) (8) of the Regulation is in complete harmony with the provisions of the Act and Regulation set forth above. “Landlord” is de-

¹ Section 205 (e) may be paraphrased to read as follows:

“If *any person* who receives rent for defense-area housing accommodations violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who pays rent for such defense-area housing accommodations * * * may * * * bring an action * * *, etc. Where an action is not brought within thirty days, the Administrator may do so on behalf of the United States.” [Italics ours.]

² “It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for *any person* * * * to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.” [Italics ours.]

fined to include an “owner, lessor, sublessor, assignee” and any “other person receiving or entitled to receive rent” or “an agent” of any of the foregoing. [Italics ours.] (*Infra*, p. 16.) So that under the Act and Regulation, the term “landlord” means “any person receiving rent.”³ As the Court of Appeals for the Fifth Circuit recently stated in the as yet unreported case of *Woods v. Willis*, No. 12356, decided December 31, 1948:

As to the excepted overcharge, the appellee is liable on two grounds: (1) He is the “landlord” of premises within the meaning of the aforesaid act and regulations; and (2) he is liable as a “person” who received rent within the meaning of said act and regulations. [Italics ours.]

By its consistent use of the term “person” in Sections 4 (a), 205 (a), and 205 (e)⁴ of the Act (*infra*, p. 14), Congress endeavored to make effective its expressed intent of preventing inflation by controlling rents. The term as used in the Act and in Sections 2 (a), 10, and 13 (a) (8) of the Rent Regulation is of the broadest scope. It describes those who receive rent in connection with the use of housing accommodations, whether they be owners, lessors, brokers, sublessors, strangers, or agents of any of the foregoing. Under the Act and Regulation it is the receipt of the illegal rent which constitutes the violation, irrespective of any other relationship the receiver may enjoy. This approach, utilized by the

³ The same is true under the Housing and Rent Act of 1947. (See Appendix, *infra*, p. 16.)

⁴ Likewise in Section 205 (b) of the Act (Appendix, *infra*, p. 13).

Congress in the Act and by the Housing Expediter in the Regulation, very practically recognizes that it is the payment and receipt of excessive rents that is inflationary, not the identity of the person who receives the over-ceiling rents. Hence, the employment of the unrestricted term "any person" in defining the violation (See too: *Bowles v. Ruppel*, 157 F. 2d 263 (C. C. A. 3).) "The 'seller' is individually liable for the overcharges he collects" (*Martini v. Porter*, 157 F. 2d 35 (C. C. A. 9), certiorari denied, 330 U. S. 848).

Turning now to the evidence in the case, it is clear that appellant at least shared in the receipt of the admitted overcharges collected by Hammond during the crucial period from July 13, 1945, through September 1, 1947, to the extent first of \$150.00 per month until approximately July 1946 and thereafter to the extent of \$125.00 per month until September 1947. That this \$150.00 monthly payment comprised part of the illegal rents collected by Hammond is shown by his testimony, as follows (at p. 104):

Q. Mr. Hammond, you have heard the testimony of the various witnesses that preceded you on the stand to the effect that they paid you rent on a number of occasions. After they paid you the rent what did you do with it?

A. Well, I took \$18.00 of it and gave it to Mr. Toobert each month, and the other \$22.00 I put it aside until I had gotten enough to fix up those houses that wasn't in no living condition when I taken them over from Mr. Toobert.

The COURT. I can't understand. Speak louder, please.

A. Yes, sir. I taken the \$18.00 of the money that they gave me and paid Mr. Toobert.

The COURT. Mr. Toobert?

The WITNESS. Yes, sir. * * *

In view of the foregoing testimony, it is of no significance, as appellant alleges (Appellant's Br., p. 16), that these payments of \$150.00 out of the illegal rents collected took the form of a flat sum.

The fact that the \$150.00 payments were paid to Toobert by Hammond from the illegal rents collected for the particular premises by the latter is of particular significance because the alleged oral contract of sale under which the payments were ostensibly made was found by the District Court to be void from the start (R. 160).⁵ This finding is in accord with the well-settled law in California that an oral contract for the sale of realty is void (*Dondero v. Aparicio*, 63 Cal. App. 373, 218 Pac. 608; *Craig v. Zelian*, 137 Cal. 105, 69 Pac. 853; *Paul v. Layne and Bowler Corp.*, 9 Cal. 2d 561, 71 Pac. 2d 817; Subsection 4 of Section 1624, Cal. Civil Code).

Inasmuch as the alleged oral contract of sale was void from the start, appellant Toobert's status with respect to the properties and his relation to Hammond and the tenants must be ascertained from his conduct as established by the evidence in the case. After

⁵ The circumstances surrounding the alleged contract were, to say the least, unusual. Although the alleged sale price was \$17,500, contrary to customary business practice for realty of far lesser value, no down payment was required (R. 130). No receipts were given by Toobert to Hammond for the \$150.00 monthly payments (R. 150). Moreover, defendant Hammond did not even appear to be sure that he was buying the properties (R. 119, 120).

weighing all of the evidence, the District Judge found that during the period from July 13, 1945, through September 1, 1947, appellant Toobert and defendant Hammond were landlords within the unrestricted language of the regulations under which *any person* who participates in the receipt of illegal rents is defined as a landlord. That evidence is briefly summarized as follows:

(a) During the period in question, appellant Toobert was admittedly the legal owner of the premises (R. 120);

(b) Hammond initially paid Toobert \$150.00 and later \$125.00 per month out of the illegal rents collected by the former for the premises (R. 104, 105);

(c) Toobert gave Hammond no receipts for the \$150.00 monthly payments (R. 135, 136);

(d) Toobert knew of the overcharges (R. 73, 89, 102);

(e) Toobert visited and examined the premises during the period in question and promised the tenants to make repairs (R. 78, 80, 89, 90);

(f) Part of the illegal rents collected by Hammond was turned over to Toobert and all of the remainder was turned back into the properties in the form of repairs and improvements (R. 107, 108);

(g) Toobert was the sole beneficiary of the full amount of the overcharges, part of which he received in the form of monthly payments of \$150.00 or \$125.00 and the remainder of which was received in the form of repairs and improvements to the premises (R. 107-108).

It is submitted that the foregoing evidence clearly warranted the findings of the District Court that

Toobert, together with Hammond, were the landlords of the particular accommodations and participated in the collection of the illegal rents.

Nor is there any merit to appellant's contention (Appellant's Br., pp. 21, 22) that the judgment of the lower Court, insofar as it imposes upon him a several responsibility to restore to the tenants certain of the overcharges collected (R. 32), is contrary to the equitable principle of unjust enrichment upon which restitution under Section 205 (a) of the 1942 Act and Section 206 (b) of the 1947 Act is based. Appellant contends that he was enriched only by the receipt of \$150.00 monthly and later by the receipt of \$125.00 monthly, neither of which sums has been established by plaintiff to exceed the aggregate maximum rentals on the seven apartments in the particular premises (Appellant's Br., p. 22). The latter contention is wholly irrelevant. The complaint alleges overcharges, and the District Court found such overcharges, only with respect to five of the units in the particular premises. The fact that there is a total of seven or seventeen units in the premises is immaterial. The maximum rents as well as the overcharges on these five units are admitted by appellant and are not questioned by him in this appeal (Appellant's Br., pp. 2, 3). Moreover, the uncontradicted evidence of defendant Hammond establishes that after he made his monthly payments to Toobert, out of the illegal rents collected, all of the funds that remained were turned back into the property in the form of repairs and improvements (R. 107, 108). The net result of these transactions was that Toobert re-

ceived all of the overcharges, either directly, in specie, or indirectly, through improvements and consequent enhancement of the value of the property.

As to the sufficiency of the evidence in the case to support the lower Court's findings and judgment, the language of this Court expressed in the case of *Coffin-Redington Co. v. Porter*, 156 F. 2d 113 is particularly applicable. In that case this Court stated as follows:

The trial court observed their conduct and demeanor while on the stand, and was in a better position than we are to appraise the situation and to draw inferences. We are not able to say that the finding in question was clearly erroneous and are therefore obliged to accept it. *Columbian Life Insurance Co. v. A. Quandt & Sons*, 9 Cir., 154 F. 2d 1006.

To the same effect, see: *Lowery v. United States*, 156 F. 2d 153 (C. C. A. 9); *Augustine v. Bowles*, 149 F. 2d 93 (C. C. A. 9); *Barnes v. Bowles*, 157 F. 2d 790 (C. C. A. 5).

CONCLUSION

The judgment below is correct in all respects and should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS

1. Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. sec. 901, et seq.):

SEC. 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 206 * * * or to offer, solicit, attempt, or agree to do, any of the foregoing.

SEC. 205 (a.) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

SEC. 205 (b). Any person who willfully violates any provision of section 4 of this Act, and

any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

SEC. 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the persons who by such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. * * *

2. Housing and Rent Act of 1947, as amended (50 U. S. C. A. App. sec. 1881, et seq.):

SEC. 206 (b). Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

3. Rent Regulation for Housing (10 F. R. 13528):

SEC. 2. *Prohibition against higher than maximum rents*—(a) *General prohibition*. Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with the use or occupancy on

and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received.

SEC. 13. *Definitions.* (a) When used in this regulation the term:

(8) "Landlord" includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing.

3. Controlled Housing Rent Regulation (12 F. R. 4331) :

SECTION 1. *Definitions and scope of this regulation.*

"Landlord" includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing.

SEC. 2. *Prohibition against higher than maximum rents.*—(a) *General prohibition.* Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall offer, demand or receive any rent for or in connection with the use or occupancy on and after the effective date of this regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing.

No. 12030.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EWELL TOOBERT,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of the
Housing Expediter,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 12030.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EWELL TOOBERT,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of the
Housing Expediter,

Appellee.

APPELLANT'S REPLY BRIEF.

ARGUMENT.

On pages 8-9 of his brief appellee has quoted two questions and answers from the testimony of witness Jack Hammond, to the effect that Hammond paid Toobert \$18.00 from the monthly rental of each tenant. There are contradictions in the testimony of this witness, who, be it noted, is not our witness and was not called by us, and we think that a reading of his entire testimony is the only satisfactory way to resolve these inconsistencies. Taken as a whole, we submit that the only reasonable conclusion to be drawn is that Hammond meant to inform the court that his payments to Toobert were flat payments, first of \$150.00 per month and later of \$125.00 per month, and that the obligation to make such payments was indepen-

dent of, and not contingent upon, his collection of rents from the occupants. Thus in the later portions of his testimony, when both the court and appellee's counsel attempted to resolve these inconsistencies, the witness testified as follows:

"The Court: Were you renting these apartments to these different people here yourself?

The Witness: Yes, sir.

The Court: You were renting them yourself?

The Witness: Yes, sir.

The Court: What did the other defendant have to do with it?

The Witness: Owner. Who?

The Court: Mr. Toobert.

The Witness: Toobert, yes; he is the owner. I don't know, frankly speaking, if he is or not. I was renting from him.

The Court: You were renting from him and renting to these others, is that it?

The Witness: Yes. First, Mr. Toobert decided to sell me the place.

The Court: After that you rented, you said, to these other people?

The Witness: Yes, sir." [Tr. p. 107]

and:

"Q. When you were renting these places how much money did you turn over to Mr. Toobert in the aggregate? Did you turn it over depending on how much you took in or did you turn over a flat sum every month? A. A flat sum every month.

Q. How much was that? A. When I first taken that, I turned over \$150.00 to him every month for one year." [Tr. p. 111.]

The appellee, as did the trial judge in his oral opinion, lays stress on the asserted proposition of law that under California law an oral agreement to sell real property is "void from the start." The law in California is that contracts within the statute of frauds are not void, but are merely unenforceable by judicial procedure, although valid in other connections and for other purposes; such contracts are neither illegal nor void, but in themselves, and apart from the question of remedy, are perfectly valid. Thus, in *O'Brien v. O'Brien*, 197 Cal. 577 (241 Pac. 861), the Supreme Court of California states on page 586:

"It is the general rule, however, that a contract falling within the operation of the statute, but made in contravention thereof, is not invalid in the sense that it is void. It is merely voidable. The statute is said to relate to the remedy only and not to affect the validity of the oral contract. Such a contract, if otherwise valid, remains so, and the sole effect of the statute is to render it unenforceable by one party against the will of the other who abandons or repudiates it."

And to the same effect, and explicitly holding that such a contract is not void are:

Ayoob v. Ayoob, 74 Cal. App. 2d 236 at 242, 168 P. 2d 462;

Thompson v. Schurman, 65 Cal. App. 2d 432 at 438, 150 P. 2d 509;

Taylor v. Hill Co., 67 Cal. App. 2d 581, 154 P. 2d 926.

The three cases cited on page 9 of appellee's brief not only do not support the proposition that such contracts are void, but the case of *Dondero v. Aparicio*, 63 Cal. App. 373, 218 Pac. 608, is to the opposite effect. Thus, to the extent that appellee's argument is based on the oral contract being void, it must necessarily fall to the ground.

In a discussion of the sufficiency of the evidence to support the crucial findings, let us point out that we are not concerned here with any question of conflict of evidence, or balancing of credibility of witnesses, one against the other. We do not challenge the sufficiency of plaintiff's evidence because we contend his witnesses did not speak the truth. We challenge it because giving full credit to that testimony, it still falls far short of that necessary *substantial evidence* which the law requires to support a finding of fact. In our opening brief we discussed the evidence to which appellee refers on page 10 of his brief—in fact we quoted most of it—and we will avoid repetition; however, we must point out that appellee has been overzealous in his summary on page 10; thus there is no evidence that Toobert knew what the maximum rents were, hence he could not have known of the overcharges, nor does the evidence at all bear out the statement that Toobert “promised the tenants to make repairs.” Appellee's last two items, (f) and (g) are really identical, and we wish merely to observe that whether Hammond did or did not spend money for repairs in the houses does not even remotely have any probative value in deciding whether privacy existed between Toobert and the tenants.

There seems to be implicit in some passages of appellee's brief the idea that Toobert had the affirmative duty of disproving plaintiff's allegations. That such a conception is erroneous requires no citation of authority. Our whole contention is that plaintiff failed to make out a *prima facie* case, and if we are correct in that, then the judgment cannot stand.

Respectfully submitted,

GEORGE W. DOWNING, JR.,
Attorney for Appellant.

The first of these is the fact that the
government has been unable to
obtain the necessary funds to
carry out its policy. This is due
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has been unable to raise the
necessary funds to carry out its
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No. 12032

United States
Court of Appeals
for the Ninth Circuit

BAXTER CREEK IRRIGATION DISTRICT
and W. COBURN COOK, Trustee for the Cre-
ditors of Baxter Creek Irrigation District,
Appellants,

vs.

STATE OF CALIFORNIA, FISH AND GAME
COMMISSION OF THE STATE OF CALI-
FORNIA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

OCT 16 1948

PAUL P. O'BRIEN,

CLERK

No. 12032

United States
Court of Appeals
for the Ninth Circuit

BAXTER CREEK IRRIGATION DISTRICT
and W. COBURN COOK, Trustee for the Cre-
ditors of Baxter Creek Irrigation District,
Appellants,

vs.

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COMMISSION OF THE STATE OF CALI-
FORNIA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

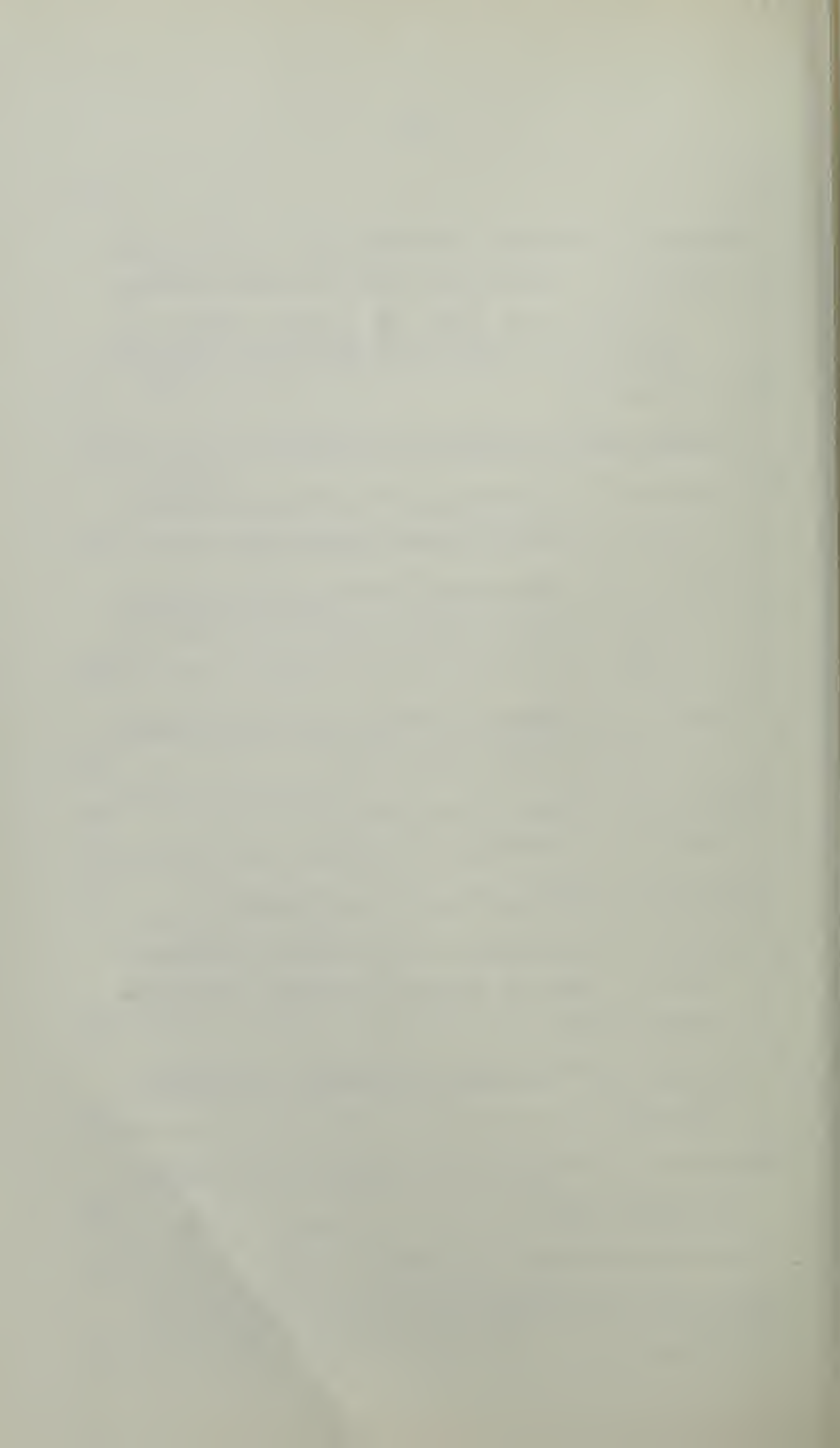
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellants:

W. COBURN COOK, Esq.,
Berg Bldg., Turlock, Calif.

Attorney for Appellee:

THOMAS W. MARTIN, Esq.,
Oroville, Calif.

In the United States District Court for the Northern District of California, Northern Division.

No. 10750

In the Matter of the BAXTER CREEK
IRRIGATION DISTRICT,

Bankrupt.

PETITION FOR ORDER TO SHOW CAUSE

Comes now the State of California and files this Petition for an Order to Show Cause why that certain land hereinafter more particularly described in Exhibit A attached hereto should not be excluded from the operation of the Plan of Composition as set forth in the Interlocutory Decree entered herein on January 3rd, 1946, and why any assessments levied thereon should not be declared null and void.

In support of this Petition the State of California shows:

1. That on January 3rd, 1946 an Interlocutory Decree was made and entered in the above-entitled court approving a Plan of Composition proposed by the Baxter Creek Irrigation District which provided that the lands described in "Exhibit B" attached thereto should be subject to said Plan of Composition and could be released therefrom only upon payment of an assessment [1*] in the amount set forth in said "Exhibit B."

2. That said "Exhibit B" of said Plan of Composition which was approved by the Interlocutory

* Page numbering appearing at foot of page of original certified Transcript of Record.

Decree of January 3rd, 1946, provided in part as follows:

Plat No. 7; Owner, Fish and Game Commission, State of California; All M.D.B.&M., description: NE $\frac{1}{4}$, N $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 4, Twp. 28 N., Range 14 E.; 280 acres; Amount, \$860.00; Exp. Asses., \$25.28; Total Amount, \$885.28.

3. That as set forth in said "Exhibit B", said land above described was owned by the State of California at the time of said Plan of Composition and Interlocutory Decree of January 3rd, 1946; that said land was a portion of a larger parcel of land hereinafter more particularly described in Exhibit "A" attached hereto and was conveyed to the State of California by Clarence E. Dakin, Elsie M. Dakin, Walter J. Dakin and Gertrude A. Dakin by Deed dated June 13, 1944; that said Deed of June 13, 1944 was approved and accepted by the State of California by a Certificate of Approval signed by James S. Dean, Director of Finance, on August 28, 1944.

4. That the above described land was not subject to said Plan of Composition or any assessment by said Baxter Creek Irrigation District because owned by the State of California; that insofar as said order of January 3rd, 1946 sought to subject land of the State of California to assessment, it was beyond and in excess of the jurisdiction of the court; that any assessment levied upon said land is null and void.

5. That the inclusion of said land in the land subject of said Plan of Composition and Interlocutory Decree of January 3rd, 1946 and the levying

of an assessment upon said land places a cloud upon the title of said land owned by the State of California.

6. That said Interlocutory Decree of January 3rd, 1946 [2] provides that the present or future owners may seek relief from errors made in setting forth the land subject of the Plan of Composition in "Exhibit B" at any time prior to April 24, 1947.

Wherefore Petitioner prays:

First: That an Order To Show Cause be issued directing the Baxter Creek Irrigation District and W. Coburn Cook, Trustee for the creditors under said Plan of Composition, to be and appear before the above entitled Court, in the Post Office Building, Sacramento, California, then and there to show cause, if any, why that certain land more particularly described in Exhibit A attached hereto should not be excluded from the operation of the Plan of Composition as set forth in the Interlocutory Decree entered herein on January 3rd, 1946, and why any assessment levied thereon should not be declared null and void.

Second: For such other relief as the Court deems just and meet in the premises.

Dated: January 10th, 1946.

STATE OF CALIFORNIA,

By /s/ E. G. BENARD,

Deputy Attorney General,
and

/s/ THOMAS W. MARTIN,

Attorneys for Petitioner. [3]

EXHIBIT A

All that real property situated in the County of Lassen, State of California, and particularly described as follows:

The SW $\frac{1}{4}$ of the NE $\frac{1}{4}$, the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$, and the S $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 2; the N $\frac{1}{2}$ of Section 11; the NW $\frac{1}{4}$, the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the diagonal NW $\frac{1}{2}$ of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 12; the NE $\frac{1}{4}$, and N $\frac{1}{2}$ of the SE $\frac{1}{4}$, and the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 4; all in Twp. 28 North, Range 14 East, M.D.B.&M.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION

Land of the State of California is exempt from taxation:

California Constitution, Sec. 1, Art. XIII;

California Revenue and Taxation Code, Sec. 202.

The principles which make property of the State nontaxable under general statutory provisions also preclude the imposition of special assessments:

Inglewood v. County of Los Angeles, 207 Cal. 697, 702; Opinion of the Attorney General of California, No. NS3366, NS2051 and NS2424.

[Endorsed]: Filed Jan. 13, 1947. [5]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF PETITION
FOR ORDER TO SHOW CAUSE

State of California,
City and County of San Francisco—ss.

Thomas W. Martin, being first duly sworn, deposes and says:

That on June 13, 1944, Clarence E. Dakin, Elsie M. Dakin, Walter J. Dakin and Gertrude A. Dakin executed a deed granting to the State of California all that real property situate in the County of Lassen, State of California, and particularly described as follows:

The SW $\frac{1}{4}$ of the NE $\frac{1}{4}$, the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$, and the S $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 2; the N $\frac{1}{2}$ of Section 11; the NW $\frac{1}{4}$, the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the diagonal NW $\frac{1}{2}$ of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 12; the NE $\frac{1}{4}$, and N $\frac{1}{2}$ of the SE $\frac{1}{4}$, and the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 4; all in Twp. 28 North, Range 14 East, M.D.B.&M.

That said deed was approved and accepted by the State of California by a Certificate of Approval signed by [6] James S. Dean, Director of Finance, on August 28, 1944.

That the State of California was the owner of said land above described at the time of the making and entering of the Interlocutory Decree of January 3rd, 1946, in the above-entitled proceeding and still is the owner of said land.

That the inclusion of said land in the Plan of

Composition approved and confirmed by said Interlocutory Decree of January 3rd, 1946, and the levying of assessments on said land has placed a cloud in the title of the State of California.

/s/ THOMAS W. MARTIN.

Subscribed and sworn to before me this 10th day of January, 1947.

(Seal) /s/ LOUIS V. VASQUEZ,
Notary Public in and for the City and County of
San Francisco.

My commission expires: December 4, 1947.

[Endorsed]: Filed Jan. 13, 1947. [7]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

To: Baxter Creek Irrigation District and W. Coburn Cook, Trustee for the creditors under the Plan of Composition approved by Interlocutory Decree made and filed herein on January 3rd, 1946, you are hereby directed to be and appear before the above entitled Court, in the Post Office Building, Sacramento, California on Monday, the 20th day of January, 1947, at the hour of 10 o'clock a.m. of said day, then and there to show cause, if any you have, why that certain land described in Exhibit "A" attached hereto should not be excluded from the operation of the Plan of Composition as set forth in the Interlocutory Decree en-

tered herein on January 3rd, 1946, and why any assessment levied thereon should not be declared null and void.

Dated: January 13th, 1947.

/s/ ROGER T. FOLEY,
Judge, United States District
Court.

[Endorsed]: Filed Jan. 13, 1947. [8]

[Title of District Court and Cause.]

AFFIDAVIT OF W. COBURN COOK, TRUS-
TEE, SHOWING CAUSE

Comes now W. Coburn Cook, Trustee herein, and shows cause why an order should not be made herein excluding from the operation of the plan of composition set forth in the interlocutory decree entered herein January 3, 1946, the lands described in these proceedings and claimed by the Fish and Game Commission of the State of California in their affidavit herein for an order to show cause, and why the assessments levied thereupon should not be declared null and void, and for that purpose makes the following affidavit:

State of California,
County of Stanislaus—ss.

W. Coburn Cook, being duly sworn, says:

That he is the Trustee herein appointed by this Court and is acting as such.

1. That this Court has made no assessment upon

the lands claimed by the Fish and Game Commission, and there is none which can be set aside by this court.

2. That the word "amount" referred to in paragraph 2 of said petition does not refer to the amount of assessment [9] but to a contractual right to have the said lands released from the obligation represented by previous assessment.

3. Affiant has no information as to whether it is true that the State of California does own said land or how it acquired title, and therefore basing his denial upon such want of information, denies that the State of California owns said lands and denies that they were acquired on August 28, 1944.

4. Denies that said land was not subject to the plan of composition or any assessment by Baxter Creek Irrigation District for the reason stated in paragraph 4 of the petition or for any other reason. Denies that the order made by this Court on January 3, 1946 was beyond or in excess of the jurisdiction of the Court. Denies that any assessment levied upon said lands is null and void.

5. Admits that said decree of January 3, 1946 permits owners of lands to seek certain relief, but denies that the relief sought herein is permissible under said clause.

6. Asserts that the lands described herein are subject to assessment for the debts of the Baxter Creek Irrigation District.

7. Has no information as to whether Clarence E. Dakin, Elsie M. Dakin, Walter J. Dakin and Gertrude A. Dakin executed a deed to the State of

California on June 13, 1944, granting to the State of California the following described lands:

NE $\frac{1}{4}$, N $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$ Section 4, T. 28, R. 14.

That affiant has no information, knowledge or belief as to whether the matters relating to this paragraph are true, and basing his denial thereon denies each and every of said allegations, and for the same reason denies that the State of California was the owner of said lands at the time of making and entering of the interlocutory decree, and denies that it is still the owner of said land. [10]

8. Alleges that due notice was given of the proceedings herein to the Fish and Game Commission of the State of California as shown by the record herein; that they did not appear to protest or otherwise at the proceedings for settlement of the plan of composition and that the plan is res judicata as to the Fish and Game Commission of the State of California, and that the State of California is bound thereby.

9. That no assessments have been levied by this court or in these proceedings upon the lands described in the petition herein and that the questions raised relative thereto are moot questions and not subject to the jurisdiction or order of this court.

10. That the proceedings herein grant in effect an option to the State of California to relieve itself from the obligation on the bonds and warrants, but if the order herein be granted the Trustee will never

be obligated to surrender the bonds and warrants for cancellation.

11. That affiant is informed and believes and therefore alleges the fact to be that said lands were assessed by the County of Lassen for said irrigation district in the name of Dakin Brothers by proceedings commenced in 1943 in the amount of \$52,839.12.

W. COBURN COOK.

Subscribed and sworn to before me this 27th day of February, 1947.

(Seal) EMMA JANE NEARING,
Notary Public in and for the County of Stanislaus,
State of California.

Wherefore, the trustee prays that the petition of the State of California be denied.

W. COBURN COOK,
Trustee.

[Endorsed]: Filed Feb. 28, 1947. [11]

[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS RE PETITION OF STATE OF CALIFORNIA FOR ORDER EXCLUDING CERTAIN LAND FROM PLAN OF COMPOSITION AND INTERLOCUTORY DECREE APPROVING SAID PLAN

It is hereby stipulated and agreed by and between The State of California, Petitioner herein, W. Coburn Cook, Trustee, and The Baxter Creek Irrigation District, that the Petition of the State of California for an Order to Show Cause and the Trustee's Return to the Order to Show Cause may be submitted to the above-entitled court upon the following agreed statement of facts.

1. The State of California acquired the land subject of the Petition by deed dated June 13, 1944. A copy of this deed is attached hereto as Exhibit "A" and incorporated herein by reference.

2. The Director of Finance consented to the execution of the deed and accepted the property on behalf of the State of California by Certificate of Approval dated August 28, 1944. A copy of this Certificate of Approval is attached hereto as Exhibit "B" and incorporated herein by reference.

3. The deed to the State of California was recorded [12] November 14, 1944 in Book 31 of the Official Records of Lassen County, page 295, and re-recorded on December 4, 1944 in Book 31 of the Official Records of Lassen County, page 334.

4. The Board of Supervisors of Lassen County

passed a resolution in September, 1943 in connection with the preparation of an assessment roll of the lands in the Baxter Creek Irrigation District and the levy of an assessment upon said lands. A copy of this resolution of the Board of Supervisors is attached hereto as Exhibit "C" and incorporated herein by reference.

5. Notice was published in the Lassen Advocate on November 18 and November 25, 1943 that the Assessment Roll of the Baxter Creek Irrigation District had been completed and that the Board of Supervisors of Lassen County would meet as a Board of Equalization on December 13, 1943 to hear requests for any change or correction in the Assessment Roll.

6. The Board of Supervisors of Lassen County met as a Board of Equalization on December 13, 1943 to hear requests for any change or correction in the Assessment Roll which had been prepared for the Baxter Creek Irrigation District.

7. Notice to landowners in the Baxter Creek Irrigation District that assessments levied were now due and payable and would become delinquent February 28, 1944 was published in the Lassen Advocate on December 30, 1943 and January 6, 1944.

8. The Assessment Roll prepared for the purpose of the Irrigation District assessment and hereinabove referred to in paragraphs 5, 6 and 7 set forth the description of the property assessed, the name of the owner and the amount of the assessment against the land. The land subject of the

Petition of the State of California was not included in the Assessment Roll. [13]

9. Notice was published in the Lassen Advocate on March 30, April 6 and April 13, 1944 that the real property described in the Assessment Roll for Baxter Creek Irrigation District, hereinabove referred to in Paragraphs 5, 6, 7 and 8, would be sold to the Irrigation District unless the assessments, penalties and costs on the property as shown on the list attached to the Notice was paid prior to April 24, 1944. The land subject to the Petition of the State of California was not described in the list of properties attached to this Notice.

10. On March 20, 1940 this court rendered a judgment in favor of the plaintiff in the case of Pueblo Trading Co., Plaintiff, vs. Baxter Creek Irrigation District, Defendant, No. 4195L, which judgment amongst other things required the Baxter Creek Irrigation District to make provision for the judgment by levying and collecting assessments against the lands in said district in the manner provided by the California Irrigation Districts Act, and that upon the failure or refusal of the district to make such provision that the Board of Supervisors and other officials of the county of Lassen make provision for the payment of the judgment in the same manner and that this court retain jurisdiction

of the cause and that the plaintiff might apply to the court for further relief.

The district had not levied any assessments against the lands of the district for payment of its bond issues or debts since 1927, and it failed to carry out the provisions of the judgment referred to herein; whereupon the plaintiff applied to this court and on July 20, 1943 was granted an order to show cause why the district and the county officials should not be punished for contempt for failure to carry out the provisions of the judgment; whereupon the county officials appeared in this court and promised the court that they would levy the assessments, not only [14] for the judgment but for all of the debts of the Baxter Creek Irrigation District, which assessments were to be levied upon all the lands subject to assessment therefor, and pursuant to said promise proceeded to make a levy upon certain lands within said district, and by their return showed that they had made an assessment, a copy of which return is hereunto annexed marked Exhibit "E"; that said assessment roll did not include the lands now owned by the State of California, and which said lands at that time and prior to their acquisition by the State of California were assessed to and stood on the rolls of the County Assessment Roll and were owned by Dakin Bros.; that other lands also were omitted from said assess-

ment roll and the said Pueblo Trading Co. on September 21, 1944 filed a notice of motion in said case for an order to compel the Board of Supervisors of Lassen County to levy an assessment upon the lands which the said plaintiff claimed were omitted from the previous assessment roll by the Board of Supervisors of Lassen County including the land subject of the Petition of the State of California.

11. Pursuant to the foregoing motion, an Order was entered in the above-mentioned case on September 26, 1944 directing the Board of Supervisors of Lassen County and other county officers to prepare a supplemental assessment roll and proceed to levy an assessment on the lands described in the Order. The land subject of the Petition of the State of California was among the lands described in this Order.

12. Notice was published in the Lassen Advocate on December 14th and 21st, 1944 that a Supplemental Assessment Roll for the Baxter Creek Irrigation District had been prepared and that the Board of Supervisors of Lassen County would meet [15] as a Board of Equalization to hear requests for changes or corrections in this Assessment Roll on January 2, 1945.

13. The Board of Supervisors met as a Board of Equalization and accepted the Supplemental Assessment Roll of the Baxter Creek Irrigation District on January 2, 1945.

14. Notice of the assessment set forth on the Supplemental Assessment Roll was published in

the Lassen Advocate on January 25, and February 1, 1945.

15. The land subject of the Petition of the State of California was described in the Supplemental Assessment Roll hereinabove referred to in Paragraphs 12, 13 and 14.

16. February 6, 1945 the Directors of the Baxter Creek Irrigation District passed a resolution providing for the levy of an assessment on certain land which had been omitted from the original Assessment Roll for the Baxter Creek Irrigation District. The land subject of the Petition of the State of California was included in the lands subject of this resolution. A copy of this resolution is attached hereto as Exhibit "D" and incorporated herein by reference.

17. Notice was published in the Lassen Advocate on April 26, May 1, and May 10, 1945 that the real property described in the Supplemental Assessment Roll would be sold to the Irrigation District unless the assessments, penalties and costs shown on the list attached to the Notice was paid prior to May 21, 1945. The land subject of the Petition of the State of California was described in the list of properties attached to this Notice.

18. The Board of Supervisors of Lassen County did not pass any resolution regarding the assessment of lands in the Baxter Creek Irrigation District besides the resolution of September, 1943, hereinabove referred to in Paragraph 4. [16]

19. The Directors of Baxter Creek Irrigation District passed no resolution in connection with the levy of an assessment upon the lands subject of the Petition of the State of California prior to February 6, 1945.

Dated: May 29th, 1947.

STATE OF CALIFORNIA,
By /s/ THOMAS W. MARTIN,
Attorney.

W. COBURN COOK,
Trustee,

By /s/ W. COBURN COOK,
Attorney.

BAXTER CREEK
IRRIGATION DISTRICT,
By /s/ FRANKLIN A. DILL,
Attorney. [17]

EXHIBIT "A"

DEED

We, Clarence E. Dakin and Elsie M. Dakin, his wife; and Walter J. Dakin and Gertrude A. Dakin, his wife, the first parties, for and in consideration of the sum of \$22.50 for each acre of a total of 980 acres to us in hand paid, receipt whereof is hereby acknowledged, hereby grant to the State of California, the second party, all that real property situate in the County of Lassen, State of California, and particularly described as follows:

The SW $\frac{1}{4}$ of the NE $\frac{1}{4}$, the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$, and the S $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 2; the N $\frac{1}{2}$ of Section 11; the NW $\frac{1}{4}$, the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$, and the diagonal NW $\frac{1}{2}$ of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 12; the NE $\frac{1}{4}$, and N $\frac{1}{2}$ of the SE $\frac{1}{4}$, and SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 4; All in Township 28 North, Range 14 East, Mt. Diablo Base and Meridian. Together with all the water rights, including flood, flowage and storage rights as defined in Judgment and Decree Number 4573 of the Superior Court of the State of California, in and for the County of Lassen, dated April 18, 1940, and thereby assigned to the above-named owners, excepting therefrom the undivided one-half interest of the above-named owners in and to Whitewater Reservoir, Dakin Reservoir and Hartson Ditch, which was conveyed by deed to Hartson and Sons a corporation. Also including that certain water right on Baxter Creek filed on by C. E. Dakin, March 2, 1899, and recorded April 3, 1899 in Book "A", Water Rights, Office of the Recorded Lassen County; all of the above-mentioned water rights being appurtenant to the above-described lands.

Reserving to the first parties the right of occupancy of the premises for a period of sixty (60) days after date of recordation hereof, and the pasture rights on both stubble and meadow until January 1, 1945; and further reserving unto said first parties and their privies the crop of grain appur-

tenant to the premises above-described at date hereof.

In witness whereof, the said first parties have executed this conveyance this 13th day of June, 1944.

/s/ CLARENCE E. DAKIN,
/s/ ELSIE M. DAKIN,
/s/ WALTER J. DAKIN,
/s/ GERTRUDE A. DAKIN.

State of California,
County of Lassen—ss.

On this 13th day of June in the year one thousand nine hundred and forty four before me, Electa Lazard, a Notary Public in and for the County of Lassen, State of California, residing therein, duly commissioned and sworn, personally appeared Clarence E. Dakin, and Elsie M. Dakin, his wife and Walter J. Dakin and Gertrude A. Dakin, his wife, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal in the County of Lassen, the day and year in this certificate first above written.

(Seal) ELECTA LAZARD,
Notary Public in and for the County of Lassen,
State of California.

My Commission Expires July 9, 1945. [18]

EXHIBIT "B"

State of California
Department of Finance
State Capitol
Sacramento, California

CERTIFICATE OF APPROVAL

The undersigned, Director of Finance of the State of California, hereby consents to the Execution of the annexed conveyance dated June 13, 1944, from Clarence E. Dakin, Elsie M. Dakin, Walter J. Dakin and Gertrude A. Dakin, to the State of California, comprising 980 acres of land in the County of Lassen, State of California, and accepts the said conveyance and the real property described therein upon behalf of the State of California.

JAMES S. DEAN,
Director of Finance,
By JAMES S. DEAN.

Dated: August 28, 1944. [19]

EXHIBIT "C"

"On motion of Supervisor Emerson, seconded by Supervisor McClelland, the following resolution is adopted:

Be it resolved by the Board of Supervisors of the County of Lassen, State of California, that

Whereas, a judgment was rendered by the District Court of the United States for the Northern District of California, Northern Division, on or about March 20th, 1940, in favor of Pueblo Trading Co., plaintiff, and against Baxter Creek Ir-

rigation District as defendant, for the sum of \$24,760.00 principal and \$10,240.79 interest, together with costs in the sum of \$12.37, with interest on said amounts from March 20th, 1940, and the sum \$8,529.00 interest appears to be due thereon, and said judgment further provided that "the defendant Baxter Creek Irrigation District make provision for the payment of said judgment by levying and collecting assessments against the lands in said irrigation district in the manner provided by "the California Irrigation District Act," and that upon the failure or refusal of the defendant Baxter Creek Irrigation District and its officers to make such provision, that the Board of Supervisors and other officers of the County of Lassen, State of California make provision for the payment of said judgment by levying and collecting assessments against the lands in said district in the manner provided by "the California Irrigation District Act"; and

Whereas, this board of supervisors was notified of the entry of said judgment and the said Baxter Creek Irrigation District and its officers have failed to make any provision whatever for the collection thereof as provided in said judgment or otherwise, and the said United States District Court recently issued an order to show cause why the officers of this county should not be punished for contempt of court for failure to make such provisions, and

Whereas, the present members of the board of directors of the said Baxter Creek Irrigation District, there not being a full board, have notified the said Board of Supervisors of Lassen County

that they do not intend to levy such assessments during the fiscal year 1943-1944.

Now, therefore, it appearing that the lands of the Baxter Creek Irrigation District subject to assessment are wholly within the County of Lassen,

Be it further resolved that the duly equalized assessments made by the County Assessor of Lassen County, California, be used as a basis of assessment for the district, and that the County assessor of said County shall forthwith prepare an assessment roll based upon the equalized assessment roll of the county eliminating improvements upon the lands in said district and shall ascertain the aggregate assessed value of the property within the Baxter Creek Irrigation District as appears from said assessment roll for the current year 1943-1944, and shall deduct 15% for anticipated delinquency as provided in Section 60 of "the California Irrigation District Act" and ascertain the net assessed valuation of the land or property in said district;

And it is hereby further determined and resolved that the sum of \$43,542.16 is sufficient and necessary to be raised by assessment to pay the said judgment with accrued interest, and that the said sum be levied upon the said lands [20] in the said Baxter Creek Irrigation District based upon said equalized net assessed value for the purpose of paying the said judgment.

And whereas, it further appears that there is outstanding and unpaid an indebtedness of \$1,062,-880.00, due upon the principal and matured interest coupons of bonds duly issued by said Baxter Creek Irrigation District and which have not been paid

and are past due, that the sum of \$1,062,880.00 is necessary to be raised for the payment thereof, and a levy therefor is hereby made upon said assessment roll and the lands therein; and

Whereas, it appears that there is no collector or treasurer of such irrigation district to perform the duties imposed by said Act, that the Tax Collector and Treasurer of the County of Lassen is hereby directed to perform the duties thereof as provided by said "California Irrigation District Act," and he shall pay the County Treasurer the amount collected therefrom and said County Treasurer shall place the same in special funds to the credit of the district for the payment of said judgment and of said bonds, and shall disburse the same to the holder of said judgment and to the holders of said bonds, all as provided in said act.

The foregoing resolution was passed by the following vote:

Ayes: Supervisors Tunison, Emerson, McClelland, Gerig and Godman.

Noes: None.

Absent: None.

Report of the Treasurer of receipts and disbursements, County Hospital, Horticultural Commissioner and Milk Inspector are presented and placed on file.

Communications are read and filed.

No further business, the Board adjourns.

Approved: PETER GERIG,
 Chairman.

Attest: Maud E. Tombs, Clerk." [21]

EXHIBIT "D"

Memorial Building
Susanville, California
February 6, 1945

The regular monthly meeting of the Baxter Creek Irrigation District directors was held on Tuesday evening, February 6, 1945 in the Memorial Building, Susanville, California.

Directors present: H. J. Clark, Fred Dieter and Carl Fox. Also present: T. S. Brown and Fern S. Ohman.

The meeting was called to order by President Clark. Minutes of the last meeting were read and approved.

Bills were presented for stenographic work in the amount of \$7.50, a bond for the treasurer in the amount of \$10.00, and a bill for rent of the Native Daughter's Hall at Standish for the meeting held October 23, 1944 in the amount of \$2.50. Motion made by Fox and seconded by Dieter that these bills be paid. Motion carried.

A resolution was read providing for the levying of the new assessment. After a thorough discussion of this resolution it was moved by Dieter and seconded by Fox that the attached resolution be adopted. Motion carried.

There being no further business the meeting adjourned.

/s/ H. J. CLARK,

President,

/s/ FERN S. OHMAN,

Secretary. [22]

Exhibit "D"—(Continued)

RESOLUTION OF THE DIRECTORS OF THE
BAXTER CREEK IRRIGATION DISTRICT

Whereas, a judgment was rendered by the District Court of the United States for the Northern District of California, Northern Division, on or about March 20th, 1940, in favor of Pueblo Trading Co., plaintiff, and against Baxter Creek Irrigation District as defendant, in Case No. 4195L, for the sum of \$24,760.00 principal and \$10,240.79 interest, together with costs in the sum of \$12.37, with interest on said amounts from March 20th, 1940. and the sum of \$12,009.31 with interest appears to be due thereon, and said judgment further provided that the defendant Baxter Creek Irrigation District make provision for the payment of said judgment by levying and collecting assessments against the lands in said irrigation district in the manner provided by "the California Irrigation District Act," and that upon the failure or refusal of the defendant Baxter Creek Irrigation District and its officers to make such provision, that the Board of Supervisors and other officers of the County of Lassen, State of California, make provision for the payment of said judgment by levying and collecting assessments against the lands in said district in the manner provided by "the California Irrigation District Act"; and

Whereas, it appears that certain lands within said district were omitted from the assessment heretofore levied to pay said judgment; and

Exhibit "D"—(Continued)

Whereas, it appears that on the 26th day of September, 1944 an Order was made by Martin I. Welsh, Judge of the United States District Court of the Northern District of California, Northern Division in the case of [23] Pueblo Trading Company vs. Baxter Creek Irrigation Co., No. 4195L ordering that the Board of Supervisors of Lassen County, California, the Assessor, Tax Collector and Treasurer and other officers of said county, prepare forthwith a supplemental assessment roll of the lands omitted from the assessment roll heretofore prepared by said Board of Supervisors and officers and that said officers should proceed to levy and assess said lands for the payment of the judgment heretofore rendered in the above entitled action; and

Whereas, it appears that the land described in Exhibit A, hereto attached and incorporated in and made a part of this Resolution, and included within the aforementioned Order is not within the boundaries of the Baxter Creek Irrigation District; and

Whereas, it appears that the land described in the aforementioned Order, which is legally within said district is included in the lands hereinafter described in Exhibit B, hereto attached and incorporated in and made a part of this Resolution, all of which land is subject to assessment to pay the aforementioned judgment and accrued bond interest and principal; and

Whereas, it appears that the following officers of the Baxter Creek Irrigation District, to-wit: Three Directors, constituting a Board of Directors,

Exhibit "D"—(Continued)

an Assessor, a Collector and a Treasurer, have been duly elected and that a Secretary has been appointed by said Board of Directors and that all of said officers have qualified and are now performing the duties imposed upon them by law and are governing the Baxter Creek Irrigation District, and that no duties to govern and regulate said district are now imposed, nor do they rest with the Board of Supervisors [24] and other officers of the County of Lassen, California, pursuant to Division 2, Part 10, Chapter 7, Sections 26500-26529 of the California Water Code; and

Whereas, it further appears that there is outstanding and unpaid, an indebtedness of \$1,169,157.53 due upon the principal and accrued interest coupons of bonds duly issued by the Baxter Creek Irrigation District, and which have not been paid and are past due, and that the sum of \$1,169,157.53 is necessary to be raised for the payment thereof, and a levy should be made upon the lands described in Exhibit B, all of which are subject to assessment.

Now, therefore, be it resolved that the assessor of the aforementioned district shall forthwith prepare an assessment roll as to the lands described in Exhibit B hereto attached, and shall ascertain the aggregate assessed value of the said property exclusive of improvements and shall deduct 15% for anticipated delinquency as provided in Section 25801 of the California Water Code and shall ascertain the net assessed valuation of the aforementioned property.

Exhibit "D"—(Continued)

And, it is hereby further determined and resolved that the sum of \$47,022.47 is sufficient and necessary to be raised by assessment to pay the aforementioned judgment with accrued interest, and that the said sum be levied upon the aforementioned land described in Exhibit B based upon the equalized net assessed value for the purpose of paying the said judgment.

And, it is hereby further determined and resolved that the sum of \$1,169,157.53 is sufficient and necessary to be raised by assessment to pay the aforementioned accrued bond interest and principal, and that the said sum be levied upon the aforementioned lands described in Exhibit B [25] based upon the equalized net assessed value of said lands for the purpose of paying the said bond interest and principal indebtedness.

Be it further resolved that the Secretary, Collector and Treasurer of said Baxter Creek Irrigation District shall perform the duties required of them for the levying and collection of the assessment to pay the aforementioned judgment and the accrued bond interest and principal indebtedness of said district as provided in the California Water Code.

EXHIBIT A

Frac. NE $\frac{1}{4}$ of SE $\frac{1}{4}$: Sec. 23, Twp. 28 N., Range 13 E.—(18 acres).

Frac. NE $\frac{1}{4}$ of SE $\frac{1}{4}$: Sec. 23, Twp. 28 N., Range 13 E.—(19 acres).

N $\frac{1}{2}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$: N $\frac{1}{2}$ of S $\frac{1}{2}$ of NW $\frac{1}{4}$: Sec. 1, Twp. 28 N., Range 13 E.—(60 acres).

Exhibit "D"—(Continued)

$N\frac{1}{2}$ of $SE\frac{1}{4}$ of $NE\frac{1}{4}$: Sec. 2, Twp. 28 N., Range 13 E.—(20 acres).

$SW\frac{1}{4}$ of $SE\frac{1}{4}$ of $NE\frac{1}{4}$: Sec. 2, Twp. 28 N., Range 13 E.—(10 acres).

Frac. $SE\frac{1}{4}$ of $SE\frac{1}{4}$: Sec. 25, Twp. 28 N., Range 13 E.—(8 acres).

Frac. $W\frac{1}{2}$ of $NE\frac{1}{4}$, Frac. $NW\frac{1}{4}$ of $SE\frac{1}{4}$: Frac. $NE\frac{1}{4}$ of $SW\frac{1}{4}$: Sec. 23, Twp. 28 N., Range 13 E.—(100 acres).

$W\frac{1}{2}$ of $NW\frac{1}{4}$, $SE\frac{1}{4}$ of $NW\frac{1}{4}$, Frac. $NE\frac{1}{4}$ of $NW\frac{1}{4}$, $SW\frac{1}{4}$, Lots 1 and 2, $SW\frac{1}{4}$ of $NE\frac{1}{4}$, $NW\frac{1}{4}$ of SEP, Lot 3, Frac. $S\frac{1}{2}$ of SEP: Sec. 25, Twp. 28 N., Range 13E.

$E\frac{1}{2}$ of $NW\frac{1}{4}$, $W\frac{1}{2}$ of $NE\frac{1}{4}$: Sec. 36, Twp. w8 N., Range 13 E.—(693.58 acres).

Frac. SEP: Sec. 23, Twp. 28 N., Range 13 E.—(22 acres).

$N\frac{1}{2}$ of $SW\frac{1}{4}$ of $NW\frac{1}{4}$: Sec. 27, Twp. 29 N., Range 13 E.—(20 acres).

EXHIBIT B

$N\frac{1}{2}$ of $SE\frac{1}{4}$: Sec. 20, Twp. 29 N., Range 13 E.—(80 acres).

$SW\frac{1}{4}$ of $SE\frac{1}{4}$: Sec. 3, Twp. 28 N., Range 13 E.—(40 acres).

$NE\frac{1}{4}$ of $SW\frac{1}{4}$, $N\frac{1}{2}$ of $NW\frac{1}{4}$: Sec. 3, Twp. 28 N., Range 13 E. * (40 acres).

$S\frac{1}{2}$ of $SW\frac{1}{4}$: Sec. 34, Twp. 29 N., Range 13 E.

$NW\frac{1}{4}$ of $NW\frac{1}{4}$: Sec. 3, Twp. 29 N., Range 13 E.

$NE\frac{1}{4}$ of $NE\frac{1}{4}$: Sec. 4, Twp. 28 N., Range 13 E.—(163 acres).

Exhibit "D"—(Continued)

NE $\frac{1}{4}$, N $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$: Sec. 4, Twp. 28 N., Range 14 E.—(280 acres).

N $\frac{1}{2}$ of SE $\frac{1}{4}$, SE $\frac{1}{4}$ of SE $\frac{1}{4}$; Sec. 15, Twp. 28 N., Range 13 E.—(120 acres).

SW $\frac{1}{4}$ of NW $\frac{1}{4}$, NW $\frac{1}{4}$ of SW $\frac{1}{4}$, Frac. NE $\frac{1}{4}$ of SW $\frac{1}{4}$: Sec. 14, Twp. 28 N., Range 13 E.—(105 acres).

N $\frac{1}{2}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$: Sec. 10, Twp. 28 N., Range 13 E.—(60 acres).

S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SE $\frac{1}{4}$: Sec. 10, Twp. 28 N., Range 13 E.—(20 acres).

Frac. NW $\frac{1}{4}$ of NE $\frac{1}{4}$ (north of highway): Sec. 15, Twp. 28 N., Range 13 E.—(30 acres).

NW $\frac{1}{4}$ of SW $\frac{1}{4}$: Sec. 10, Twp. 28 N., Range 13 E.

SW $\frac{1}{4}$ of NW $\frac{1}{4}$: Sec. 10, Twp. 28 N., Range 13 E.—(80 acres).

SE $\frac{1}{4}$ of SW $\frac{1}{4}$: Sec. 4, Twp. 28 N., Range 14 E.—(40 acres).

W $\frac{1}{2}$ of NW $\frac{1}{4}$, NE $\frac{1}{4}$ of NW $\frac{1}{4}$: Sec. 9, Twp. 28 N., Range 14 E.—(120 acres).

E $\frac{1}{2}$ of SW*: Sec. 10, Twp. 28 N., Range 13 E.

Frac. NE $\frac{1}{4}$ of NW $\frac{1}{4}$: Sec. 15, Twp. 28 N., Range 13 E.—(92 acres).

S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$: Sec. 2, Twp. 28 N., Range 13 E.—(20 acres).

S $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$: Sec. 3, Twp. 28 N., Range 13 E.—(5 acres).

Frac. NE $\frac{1}{4}$ of NW $\frac{1}{4}$: Sec. 15, Twp. 28 N., Range 13 E.—(28 acres).

S $\frac{1}{2}$ of NE $\frac{1}{4}$: W $\frac{1}{2}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$: Sec. 15, Twp. 28 N., Range 13 E.—(100 acres).

Exhibit "D"—(Continued)

Portion of NW $\frac{1}{4}$ of NE $\frac{1}{4}$ South of the State Highway: Sec. 15, Twp. 28 N., Range 13 E.—(10 acres). [28]

EXHIBIT "E"

In the District Court of the United States for the
Northern District of California,
Northern Division

No. 4195-L

PUEBLO TRADING CO.,

Plaintiff,

vs.

BAXTER CREEK IRRIGATION DISTRICT,
Defendant.

RETURN ON ORDER TO SHOW CAUSE

Pursuant to an oral agreement made in open Court in this case, the Board of Supervisors of Lassen County on the 14th day of September, 1943, enacted a resolution, copy of which is attached, authorizing and directing Mr. F. O. Wemple, the Assessor of Lassen County, California, to prepare an assessment roll of the land of the Baxter Creek Irrigation District. The County Assessor of Lassen County has now prepared an assessment roll on the land of said District, based on the assessment roll of the County of Lassen, State of California, which said assessment roll is in an amount sufficient to take care of the outstanding indebtedness of the Baxter Creek Irriga-

tion District, including the judgment herein entered.

The County Assessor has now prepared the assessment roll, and the Board of Supervisors of Lassen County have set December 13th, 1943, as the date upon which they will sit as a Board of Equalization to equalize said roll prepared by said County Assessor.

That the officers in Lassen County, and each of them, have each and all of them done all acts required of them in [29] connection with said Irrigation District, in accordance with the terms and provisions of the California Irrigation Distict Act, and therefore pray that an order be made by this Court dismissing the Order to Show Cause, issued by said Court on the 20th day of July, 1943.

ARTHUR J. ANDERSON,
District Attorney for the County of Lassen, State
of California.

[Endorsed]: Filed June 5, 1947.

[30]

[Title of District Court and Cause.]

AMENDMENT TO AGREED STATEMENT OF
FACTS RE PETITION OF STATE OF
CALIFORNIA FOR ORDER EXCLUDING
CERTAIN LAND FROM PLAN OF COM-
POSITION AND INTERLOCUTORY DE-
CREE APPROVING SAID PLAN.

It Is Hereby Stipulated by and between the parties hereto that the following shall be added to the Agreed Statement of Facts heretofore filed in amendment of Paragraph 17 as follows:

17-A. A copy of the notice referred to in paragraph 17 above is hereunto annexed and marked Exhibit "F" and made a part hereof by this reference.

Dated June 6, 1947.

STATE OF CALIFORNIA,

By /s/ THOMAS W. MARTIN,
Attorney.

W. COBURN COOK,
Trustee.

By W. COBURN COOK,
BAXTER CREEK IRRIGA-
TION DISTRICT,

By /s/ FRANKLIN A. DILL,
Attorney.

EXHIBIT "F"

DELINQUENT TAX LIST

County of Lassen, State of California

Tule Irrigation District and Baxter Creek
Irrigation District

Levied in the year 1944

Notice is hereby given that unless the total amount due for the year 1944 for assessments, penalties and costs on any property, as shown on the list below opposite the description of the property, is paid before 10:00 a.m., May 21, 1945, the real property on which such amounts are a lien will by operation of law be sold to the Irrigation District in which the property is located, at such time in the office of the Tax Collector at the courthouse in the City of Susanville, County of Lassen.

C. D. MATHEWS,

Tax Collector of Tule Irrigation District and Baxter
Creek Irrigation District.

Dated April 26, 1945.

Note—All Townships North. All Ranges East. Mount Diablo
Base and Meridian.

Abbreviations Used :

Sec. Section
T. Township
R. Range

TULE IRRIGATION DISTRICT

Mahle, Leland, A., et al.—Commencing at SW corner
of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 22, T. 29, R. 14 and run-
ning N. $\frac{1}{8}$ mi. E. $\frac{1}{32}$ Mile, S. $\frac{1}{8}$ mi. and W.
 $\frac{1}{32}$ mile to place of beginning\$459,162.80

36 *Baxter Creek Irrigation District, et al.*

| | |
|--|------------|
| Mapes, James W.—E $\frac{1}{2}$ of SW $\frac{1}{4}$, W $\frac{1}{2}$ of SE $\frac{1}{4}$ Sec. | |
| 19. T. 29, R. 16..... | 734,660.30 |
| Loiselle, Leroy—SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$, N $\frac{1}{2}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 6, T. 29, R. 14 | 51,018.10 |
| Bass, Grover C.—SE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 11, T. 29, R. 15.. | 183,665.10 |
| Wyatt, Ralph M., and Geo. Wyatt—NW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 9, T. 29, R. 14..... | 489,773.70 |

BAXTER CREEK IRRIGATION DISTRICT

| | |
|---|--------------|
| Bailey, Lenora—Frac. NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 23, T. 28 R. 13 | \$ 18,493.69 |
| Bailey, Lenora M.—Frac. NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 23, T. 28, R. 13 | 19,374.34 |
| Buffum, Frank B.—N $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 20, T. 29, R. 13 | 110,962.18 |
| California Lands, Inc.—SW $\frac{1}{4}$ of SE $\frac{1}{4}$, NE $\frac{1}{4}$ of SW $\frac{1}{4}$ N $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 3, T. 28, R. 13 | 42,711.61 |
| Chaffin, Emma—S $\frac{1}{2}$ of SW $\frac{1}{4}$ Sec. 34, T. 29, R. 13, NW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 3, T. 29, R. 13, NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 4, T. 28, R. 13..... | 77,057.04 |
| Clark, H. J., and Lurley—N $\frac{1}{2}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ N $\frac{1}{2}$ of S $\frac{1}{2}$ of NW $\frac{1}{4}$ Sec. 1, T. 28, R. 13 N $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 2, T. 28, R. 13 | 17,613.04 |
| Dakin, Bros.—NE $\frac{1}{4}$, N $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 4 T. 28 R. 14..... | 52,839.12 |
| Dieter, F. W.—N $\frac{1}{2}$ of SE $\frac{1}{4}$, SE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 15 T. 28, R. 13..... | 23,777.60 |
| Dieter, F. W., and Bertha—SW $\frac{1}{4}$ of NW $\frac{1}{4}$, NW $\frac{1}{4}$ of SW $\frac{1}{4}$, Frac. NE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 14, T. 28 R. 13 | 19,814.67 |
| Dieter, Noel and Donna—N $\frac{1}{2}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$, S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 10, T. 28, R. 13, Frac. NW $\frac{1}{4}$ of NE $\frac{1}{4}$ (North of Highway) Sec. 15, T. 28, R. 13..... | 21,575.97 |
| Dimke, F. J.—NW $\frac{1}{4}$ of SW $\frac{1}{4}$, SW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 10-28, R. 13 | 79,258.67 |
| Dunn, Edmund and Genevieve—SE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 4, T. 28, R. 14..... | 7,925.86 |
| Farrell, James M. and Amy—Frac. SE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 25, T. 28, R. 13..... | 7,925.86 |

| | |
|--|------------|
| Fox, Carl—W $\frac{1}{2}$ of NW $\frac{1}{4}$, NE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 9, T. 28, R. 14 | 46,234.22 |
| Gasperoni, Orlando and Victoria—E $\frac{1}{2}$ of SW $\frac{1}{4}$ Sec. 10, Frac. NE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 15, T. 28, R. 13..... | 57,682.68 |
| McCallister, R. F., et al.—S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 2 S $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 3. T. 28, R. 13 | 8,806.51 |
| McRorey, Geo. and Rachel—Frac. W $\frac{1}{2}$ of NE $\frac{1}{4}$ Frac. NW $\frac{1}{4}$ of SE $\frac{1}{4}$ Frac. NE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 23, T. 28, R. 13 | 84,102.24 |
| Otto, Richard Vaux and Lillian M.—Frac. NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 15, T. 28, R. 13..... | 5,724.23 |
| Parker Estate—S $\frac{1}{2}$ of NE $\frac{1}{4}$, W $\frac{1}{2}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 15, T. 28, R. 13..... | 59,003.68 |
| Riedel, Bruno—Portion of NW $\frac{1}{4}$ of NE $\frac{1}{4}$ South of the State Highway, Sec. 15, T. 28, R. 13..... | 2,201.63 |
| Stiles, May Florence—W $\frac{1}{2}$ of NW $\frac{1}{4}$, SE $\frac{1}{4}$ of NW $\frac{1}{4}$, Frac. NE $\frac{1}{4}$ of NW $\frac{1}{4}$, SW $\frac{1}{4}$ Lots 1 and 2, SW $\frac{1}{4}$ of NE $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 25, T. 28, R. 13, E $\frac{1}{2}$ of NW $\frac{1}{4}$, W $\frac{1}{2}$ of NE $\frac{1}{4}$ Sec. 36, T. 28, R. 13.. | 432,339.84 |
| Uruburu, Jose—N $\frac{1}{2}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 27, T. 29, R. 13 | 6,164.56 |
| Zeitler, Lyal and Cathleen—Frac. SE $\frac{1}{4}$ Sec. 23, T. 28, R. 13 | 14,530.76 |

4:26 5:3-10

[Endorsed]: Filed Nov. 24, 1947. [33]

[Title of District Court and Cause.]

SECOND AMENDMENT TO AGREED STATEMENT OF FACTS RE PETITION OF STATE OF CALIFORNIA FOR ORDER EXCLUDING CERTAIN LAND FROM THE PLAN OF COMPOSITION AND INTERLOCUTORY DECREE APPROVING SAID PLAN.

It Is Hereby Stipulated by and between the parties hereto that the following shall be added

to the Agreed Statement of Facts heretofore filed in amendment of Paragraph 16 as follows:

16-A. That the Board of Directors of Baxter Creek Irrigation District on July 2, 1946 passed a Resolution, a copy of which Resolution is hereunto attached, marked Exhibit "G" and made a part hereof by this reference.

16-B. That the Board of Directors of Baxter Creek Irrigation District on September 2, 1947 ordered the Resolution corrected to read in the form attached hereto marked Exhibit "H" and made a part hereof by this reference.

Dated October 15th, 1947.

STATE OF CALIFORNIA,

By THOMAS W. MARTIN,
Attorney.

W. COBURN COOK,
Trustee.

By W. COBURN COOK,
Attorney.

BAXTER GREEK IRRIGA-
TION DISTRICT,

By FRANKLIN A. DILL,
Attorney.

[Endorsed]: Filed Nov. 24, 1947.

[34]

EXHIBIT "G"

RESOLUTION

Whereas, the United States District Court for the State of California in its Order No. 4195-L issued at Sacramento, California, on the 27th day of August, 1945, and October 9, 1945, did exclude the lands of the following named and numbered individuals from the Baxter Creek Irrigation District:

- 1 Lenora Bailey
- 2 Lenora M. Bailey
- 6 H. J. Clark and Lurley Clark
- 13 James L. and Amy Farrell
- 17 George and Rachel McRorey
- 21 Lyman Dermott Stiles
- 23. Loyal and Cathleen Zeitler

Whereas, because of said exclusion it is apparent that these lands should not have been included in the 1945 district assessment roll prepared for the purpose of levying assessments against said property for the payment of district indebtedness, and

Whereas, it is necessary because of said Order No. 4195-L issued by the United States District Court for the State of California that the assessments levied by the District on May 21, 1945, be canceled,

Now, Therefore, Be It Resolved that the above mentioned lands have been erroneously assessed and the Secretary is hereby authorized and directed to cancel all assessments appearing on the

District assessment roll against said lands prepared on May 21, 1945.

The above resolution was introduced at a regular meeting of the Board of Directors held July 2, 1946, by Carl Fox, who moved that it be adopted. The motion was seconded by H. J. Clark and the resolution was adopted by the following vote:

Ayes: H. J. Clark, Carl Fox.

Noes: None.

Absent: Fred Dieter.

The majority of votes being favorable the resolution was declared adopted and it was so ordered.

H. J. CLARK,
Chairman.

[35]

EXHIBIT "H"

RESOLUTION TAKEN FROM MINUTES OF BAXTER CREEK IRRIGATION DISTRICT

July 2, 1946

Whereas, the United States District Court for the State of California in its order No. 4195-L issued at Sacramento, California, on the 27th day of August, 1945, and October 9, 1945, did exclude the lands of the following named and numbered individuals from the Baxter Creek Irrigation District:

1. Lenora Bailey
2. Lenora M. Bailey
6. H. J. Clark and Lurley Clark
13. James L. and Amy Farrell
17. George and Rachel McRorey
21. Lyman Dermott Stiles
23. Loyal and Cathleen Zeitler

Whereas, because of said exclusion it is apparent that these lands should not have been included in the 1944 district assessment roll prepared for the purpose of levying assessments against said property for the payment of district indebtedness, and

Whereas, it is necessary because of said Order No. 4195-L, issued by the United States District Court for the State of California, that the assessments levied by the District in 1944, be cancelled.

Now Therefore Be It Resolved that the above mentioned lands have been erroneously assessed and the Secretary is hereby authorized and directed to cancel all assessments appearing on the District assessment roll against said lands for the year 1944.

The above resolution was introduced at a regular meeting of the Board of Directors held July 2, 1946, by Carl Fox, who moved that it be adopted. The motion was seconded by H. J. Clark and the resolution was adopted by the following vote:

Ayes: H. J. Clark, Carl Fox.

Noes: None.

Absent: Fred Dieter.

The majority of votes being favorable, the resolution was declared adopted and was so ordered.

H. J. CLARK,

Chairman.

PAUL J. HOPPER,

Secretary.

[36]

I, H. J. Clark, and I, Paul J. Hopper, President and Secretary respectively of the Board of Directors of the Baxter Creek Irrigation District, do, each of us, hereby certify that the attached is a full, true and correct copy of a Resolution adopted by the said Board of Directors on the Second day of July, 1946.

Witness our hands and the seal of the Baxter Creek Irrigation District this Second day of September, 1947.

H. J. CLARK,

President.

PAUL J. HOPPER,

Secretary.

[37]

| Plat | Owner | All M.D.B.&M. Description | Acre | Amount | Bal. Exp. Assess. | Total Amount |
|--|--|--|------|-----------|----------------------|-----------------|
| 79 | Grant, Ben | NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 24, Twp. 29 N., Range 13 E. | 40 | \$ 220.00 | \$ 3.77 | \$ 223.77 |
| 80 | Winchell, F. K. | NE $\frac{1}{4}$ of SW $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 7, Twp. 28 N., Range 14 E. | 80 | 440.00 | ..... | 440.00 |
| 81 | Wright, Martin E. | N $\frac{1}{2}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 11; NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 14, Twp. 29, Range 13 E. | 100 | 550.00 | 16.17 | 566.17 |
| 82 | Zangger, Edward | NE $\frac{1}{4}$ of NW $\frac{1}{4}$, NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 14; S $\frac{1}{2}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$, SE $\frac{1}{4}$ of SW $\frac{1}{4}$, E $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$, SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$, and S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 11; NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 15; SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$, S $\frac{1}{2}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 10, Twp. 29, Range 13 E. | 230 | 965.00 | ..... | 965.00 |
| Supplement to Baxter Creek Irrigation District | | | | | | |
| 3 | Buttum, Frank B. | Included in No. 12 of original roll. | | | | |
| 4 | California Lands, Inc. c/o Chas. Degiovanni | SW $\frac{1}{4}$ of SE $\frac{1}{4}$, NE $\frac{1}{4}$ of SW $\frac{1}{4}$, N $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 3, Twp. 28 N., Range 13 E. | 100 | 550.00 | 16.17 | 566.17 |

| Plat No. | Owner | All M.D.B.&M. Description | Acres | Amount | Bal. Exp. Assess. | Total Amount |
|----------|---|--|-------|---------|----------------------|-----------------|
| 5 | Hall, Lohrun C. and Reba A. | S $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 34, Twp. 29 N., Range 13 E.; NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 3, Twp. 28 N., Range 13 E., NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 4, Twp. 28 N., Range 13 E. | 163 | 507.50 | 14.92 | 522.42 |
| 7 | Fish and Game Commission, State of California | NE $\frac{1}{4}$ N $\frac{1}{2}$ of SE $\frac{1}{4}$, SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 4, Twp. 28 N., Range 14 E. | 280 | 860.00 | 25.28 | 885.28 |
| 8 | Dieter, F. W. | Included in No. 26 of original roll. | | | | |
| 9 | Dieter, F. W. and Bertha | SW $\frac{1}{4}$ of NW $\frac{1}{4}$, NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 14, Twp. 28 N., Range 13 E. Fractional of the NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 14, Twp. 28 N., Range 13 E., lying southwesterly of the State Highway. | 105 | 397.50 | 5.39 | 402.89 |
| 10 | Dieter, Noel and Donna T. | Included in No. 31 of original roll. | | | | |
| 11 | Dimke, F. J. | NW $\frac{1}{4}$ of SW $\frac{1}{4}$, SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 10, Twp. 28 N., Range 13 E. Included in No. 33 of original roll. | 80 | 1117.50 | 32.80 | 1150.35 |
| 12 | Dunn, Edmond and Genevieve | | | | | |
| 14 | Fox, Carl | Included in No. 36 of original roll. | | | | |

In the District Court of the United States for the
Northern District of California,
Northern Division

No. 10750

In the Matter of BAXTER CREEK IRRIGA-
TION DISTRICT,

Bankrupt.

MEMORANDUM AND ORDER

Petition was filed on behalf of the State of California to exclude from the operation of the plan of composition as set forth in the Interlocutory Decree of January 3, 1946 herein certain described real property and to have the assessment levied pursuant thereto declared null and void. By the decree the State of California through the Fish and Game Commission was assessed the sum of \$885.28.

The State of California now contends that it had acquired title before the assessment created a lien upon its land and that being state land devoted to a public use it was exempt from the assessment.

According to the agreed statement of facts deed to the land in question was accepted by the Director of Finance of the State of California on August 28, 1944 and the deed recorded November 14, 1944 and re-recorded December 4, 1944.

January 2, 1945 the Board of Supervisors met and approved a supplemental assessment roll which included the land owned by the State of Califor-

nia, and on February 6, 1945 the Directors of Baxter Creek Irrigation District levied the assessment herein complained of. [39]

The Trustee in seeking to enforce payment of the sum assessed argues that since Section 25925 of the Water Code of the State of California creates a lien as of the first Monday of March of the year of an assessment and as the assessment herein was for the year 1944 the lien therefore should relate back and be effective as of the first Monday in March, 1944, which would be prior to the date the State of California obtained the land; a fortiori, the state would take subject to the lien.

Section 25925 states "The annual district assessment upon land is a lien against the property assessed from and after the first Monday in March of the year in which the assessment is levied." The language of the section clearly states that a lien could arise only if there is an assessment attaching in the year in which it was ordered. The term "year" should be given its common and usual definition of a calendar year, unless something to the contrary is specifically shown. Throughout the Water Code references made to a "calendar year" are persuasive in construing the word "year" to be other than a "fiscal year" as contended for by the Trustee.

The levy of the assessment having been made February 6, 1945 the lien would be effective as of the first Monday in March of 1945. The assessment coming after the State of California had acquired title, the lien likewise attached after the

acquisition and the State of California would not be liable for the assessment if the land is being used for a public purpose, La Mesa etc. Irrigation Distict v. Hornbeck, 216 Cal. 230; Conley v. Hawley 2 Cal. 2d 23. Lands purchased by the Fish and Game Commission under state [40] authority to be used in the carrying out of the functions of the Commission are lands impressed with a public purpose.

It is hereby ordered that the petition of the State of California be granted, that the land owned by it is excluded from the effect of the Interlocutory Decree of January 3, 1946, and the February 6, 1945 assessment levied thereon is declared to be null and void.

Dated July 9th, 1948.

DAL M. LEMMON,
United States District Judge.

Entered in Civil Docket July 9, 1948.

[Endorsed]: Filed July 9, 1948.

[41]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF MEMORANDUM
AND ORDER

To Baxter Creek Irrigation District and its attorney, Franklin A. Dill, and W. Coburn Cook, Trustee:

You, and each of you will please take notice that the above entitled court has entered and filed its Memorandum and Order granting the Petition of the State of California in the above entitled matter; that said Memorandum and Order was entered and filed on July 9th, 1948.

Dated this 22nd day of July, 1948.

FRED N. HOWSER,
Attorney General of State of
California.

E. G. BENARD,
Deputy Attorney General.

THOMAS W. MARTIN,
Special Counsel.
Attorneys for State of
California.

By THOMAS W. MARTIN.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed July 23, 1948. [42]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Baxter Creek Irrigation District and W. Coburn Cook, Trustee for the Creditors of Baxter Creek Irrigation District, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Memorandum and Order dated July 9, 1948, and from the whole thereof.

Dated: July 30, 1948.

W. COBURN COOK,
Attorney for Appellants.

[Endorsed]: Filed Aug. 19, 1948. [44]

[Title of District Court and Cause.]

STATEMENT OF POINTS AND ASSIGNMENT OF ERRORS ON APPEAL

The Appellants, Baxter Creek Irrigation District and W. Coburn Cook, Trustee for the creditors of Baxter Creek Irrigation District, make the following assignment of errors which they aver occurred in the determination of this proceeding and in the rendering of the decree appealed from, and state that the points on which they intend to rely on the appeal of this cause are the following:

1. The Court erred in construing and holding the word "year" in Section 25925 of the Water Code of the State of California to mean the calendar year in which the assessment is ordered or levied.

2. The Court erred in holding the lien assessment levied February 6, 1945, became effective the first Monday in March, 1945.

3. In any event the assessment was validated by statute as an assessment of the year 1944.

4. The application was barred by the statute of limitations.

5. The Court erred in holding that lands acquired [45] for the Fish and Game Commission of the State of California are necessarily or in this instance acquired for a public purpose and as such exempt from assessment thereafter for payment of the bond debt of the district.

6. The Court erred in finding and holding that the Court by decree ever assessed the lands of the Commission in the sum of \$885.28 or any other sum or that the assessment levied by the Baxter Creek Irrigation District was in any sum less than \$52,000.

7. The Court erred in finding or holding that the Trustee seeks in these proceedings to enforce payment of the sum of \$885.28, which was the redemption figure mentioned in the Interlocutory Decree herein.

8. The Court was without jurisdiction to declare null and void the assessment of February 6, 1945, and its order in that respect was an interference with the sovereignty of the State of California.

9. The Court erred in excluding the lands of the Commission from the plan of composition.

10. The terms of the Interlocutory Decree and

all issues herein determined by the Court are res judicata.

11. The order of the Court constitutes a taking of the creditors' property without due process and without just compensation.

Dated: August 24, 1948.

W. COBURN COOK,
Attorney for Appellants.

[Endorsed]: Filed Aug. 25, 1948. [46]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Appellants Baxter Creek Irrigation District and W. Coburn Cook, Trustee for the creditors of Baxter Creek Irrigation District, designate the following as those parts of the record as necessary for the consideration of the points on which appellants intend to rely on this appeal and for printing, to-wit:

1. Transcript of Record on Appeal in case No. 11632, United States Circuit Court of Appeals for the Ninth Circuit, W. Coburn Cook, as Trustee, Appellant, vs. Baxter Creek Irrigation District and the Landowners, H. J. Clark, Lurley Clark, Lenora M. Bailey, Lyal Zeitler, George McRorey, Rachel McRorey, Mr. and Mrs. E. A. Blickenstaff and James N. Farrell and Amy L. Farrell, appellees.

2. Order to Show Cause filed Jan. 13, 1947, Petition for Order to Show Cause dated January

10th, 1946, Affidavit in Support of Petition for Order to Show Cause, dated January 10th, 1947.

3. Affidavit of W. Coburn Cook, Trustee, Showing Cause, dated February 27, 1947. [47]

4. Agreed Statement of Facts re Petition of State of California for Order Excluding Certain Land from Plan of Composition and Interlocutory Decree Approving said plan, together with Exhibits A, B, C, D, and E.

5. Amendment to Agreed Statement of Facts re Petition of State of California for order excluding certain land from plan of composition and interlocutory decree approving said plan, dated June 6, 1947, together with Exhibit F.

6. Second Amendment to Agreed Statement of Facts re Petition of State of California for Order Excluding Certain Land from the Plan of Composition and Interlocutory Decree Approving said Plan, together with Exhibit G.

7. Memorandum and Order, dated July 9, 1948.

8. Notice of Entry of Memorandum and Order, dated July 22, 1948.

9. Notice of Appeal.

10. Statement of Points and Assignment on Appeal.

11. This Designation of Contents of Record on Appeal.

Dated: August 24, 1948.

W. COBURN COOK,
Attorney for Appellants.

[Endorsed]: Filed Aug. 25, 1948. [48]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDI-
TIONAL PORTIONS OF RECORD
ON APPEAL

Appellee State of California hereby designates the following additional portions of the record which appellee desires to have included in the record on appeal:

1. Exhibit H attached to Second Amendment to agreed statement of facts, re Petition of State of California for Order Excluding Certain Land from the Plan of Composition and Interlocutory Decree Approving said plan.

2. Page 8 of Schedule B attached to the Plan of Composition, being Agreement of August 28, 1945, between W. Coburn Cook and the Baxter Creek Irrigation District.

3. This Designation of Additional Contents of Record on Appeal.

Dated: September 4, 1948.

/s/ THOMAS W. MARTIN,
Attorney for Appellee.

[Endorsed]: Filed Sept. 4, 1948. [49]

(Affidavit of Service attached.)

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 49 pages, numbered from 1 to 49, inclusive, contain a

full, true and correct transcript of certain records and proceedings in the matter of the Baxter Creek Irrigation District, No. 10750, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation and Counter-designation of Portions of the Record to be contained in the Record on Appeal, copies of which are embodied herein.

I further certify that the cost of preparing and certifying the foregoing Record on Appeal is the sum of Six and 50/100 (\$6.50) dollars, and that the same has been paid to me by the attorney for the appellants herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 9th day of September, A.D. 1948.

(Seal)

C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12032. United States Court of Appeals for the Ninth Circuit. Baxter Creek Irrigation District and W. Coburn Cook, Trustee for the Creditors of Baxter Creek Irrigation District, Appellants, vs. State of California, Fish and Game Commission of the State of California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed September 11, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

ff United States Circuit Court of Appeals
for the Ninth Circuit

No. 12032

BAXTER CREEK IRRIGATION DISTRICT,
and W. COBURN COOK, Trustee for the
Creditors of Baxter Creek Irrigation District,
Appellants,

vs.

FISH AND GAME COMMISSION OF THE
STATE OF CALIFORNIA, and STATE OF
CALIFORNIA,

Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY
ON APPEAL

The appellants adopt as the points on appeal on which they intend to rely, the Statement of Points designated and filed in the United States District Court.

Dated: September 15, 1948.

/s/ W. COBURN COOK,
Attorney for Appellants.

(Affidavit of Service attached.)

[Endorsed]: Filed Sept. 17, 1948. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL AND FOR PRINTING

The appellants designate as those parts of the record as necessary for the consideration of the points upon which the appellants intend to rely in this appeal and for printing the following:

1. The entire transcript of record on appeal herein except the transcript of record on appeal in the case of W. Coburn Cook as Trustee, Appellant, vs. Baxter Creek Irrigation District, et al., appellees, No. 11632 in the United States Circuit Court of Appeal for the Ninth Circuit.

2. Statement of Points and Designation of Record for Printing in the United States Circuit Court of Appeal.

Dated: September 15, 1948.

/s/ W. COBURN COOK,
Attorney for Appellants.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed September 17, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It is stipulated between appellants and appellees that the record on appeal in the case of Cook v. Baxter Creek Irrigation District, No. 11632, being a part of the record on appeal herein need not be printed but in lieu of printing three copies thereof shall be made available to the Court.

Dated: September 21, 1948.

/s/ W. COBURN COOK,
Attorney for Appellants.

/s/ THOMAS W. MARTIN,
Attorney for Appellees.

[Endorsed]: Filed September 29, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

MOTION

Appellants move the court for an order providing that that part of the Transcript of Record on Appeal herein which consists of Transcript of Record on Appeal in case No. 11632, United States Circuit Court of Appeals for the Ninth Circuit, W. Coburn Cook, as Trustee, Appellant, vs. Baxter Creek Irrigation District and the Landowners, H. J. Clark, Lurley Clark, Leonora M. Bailey, Lyal Zeitler, George McRorey, Rachel McRorey, Mr. and Mrs. E. A. Blickenstaff and James N. Farrell

and Amy L. Farrell, appellees, need not be re-printed but that in lieu of printing three copies thereof be made available to the court out of its files or from other sources.

Dated: September 15, 1948.

/s/ W. COBURN COOK,
Attorney for Appellants.

It is so ordered.

Dated: September 28, 1948.

/s/ CLIFTON MATHEWS,
Judge, U. S. Court of Appeals
for the Ninth Circuit.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed September 29, 1948. Paul P. O'Brien, Clerk.

No. 12,032

IN THE

United States Court of Appeals
For the Ninth Circuit

BAXTER CREEK IRRIGATION DISTRICT and
W. COBURN COOK, Trustee for the
Creditors of Baxter Creek Irrigation
District,

Appellants,

vs.

STATE OF CALIFORNIA and FISH AND
GAME COMMISSION OF CALIFORNIA,

Appellees.

BRIEF FOR APPELLANTS.

W. COBURN COOK,

Berg Building, Turlock, California,

Attorney for Appellants.

FILED

NOV 7 1918

W. P. O'BRIEN, ~

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No. 12,032

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BAXTER CREEK IRRIGATION DISTRICT and
W. COBURN COOK, Trustee for the
Creditors of Baxter Creek Irrigation
District,

Appellants,

VS.

STATE OF CALIFORNIA and FISH AND
GAME COMMISSION OF CALIFORNIA,

Appellees.

BRIEF FOR APPELLANTS.

JURISDICTIONAL FACTS AND PLEADINGS

The jurisdiction of this court in this appeal is under Sections 24 and 25 of the Bankruptcy Act of 1898 as amended June 22, 1938.

The proceeding in which this cause arose was one for the composition of the debt of the Baxter Creek Irrigation District, an irrigation district organized under the provisions of "the California Irrigation District Act" of the State of California approved March 31, 1897 and acts amendatory thereof. The proceeding was authorized under the provisions of Chap-

ter IX of the Bankruptcy Act of 1898 (11 U.S.C.A., Secs. 401-404).

A former appeal was taken in the same bankruptcy proceeding and numbered 11,632. The transcript of record in the former appeal contains the various pleadings and proceedings that were had in the bankruptcy court leading up to the entry of the interlocutory decree, and reference thereto will be made as occasion may require by referring to the page of the record in case No. 11,632.

The transcript of record in the former appeal is specifically made a part of the record here by order of this court (R. 58).

The Baxter Creek Irrigation District as the petitioner in the bankruptcy proceeding filed its petition for confirmation of its plan of composition September 17, 1945 (R. 2, 9, case No. 11,632). It is one of the appellants here, and the other appellant was designated and appointed trustee for the creditors by the District Court by the interlocutory decree entered January 3, 1946 (R. 60, case No. 11,632), and he was directed to carry out the terms of the plan of composition.

The appellees are the State of California and the Fish and Game Commission of the State of California, who were the applicants for an order made subsequent to the entry of the interlocutory decree. This application was for the cancellation of an assessment and to exclude the lands of the state from the plan of composition. The order was granted July 9th, 1948 (R. 47). From this order the pending appeal was taken.

Notice of the entry of the order was dated July 22nd, 1948 (R. 48) and filed July 23, 1948. The notice of appeal was dated July 30, 1948 and filed August 19, 1948 (R. 49).

The appeal thus was taken within thirty days after the giving and filing of the notice of the entry of the order.

STATEMENT OF THE CASE.

As stated above this appeal arises out of the bankruptcy composition. The petitioner, the Baxter Creek Irrigation District, is a public corporation of the State of California, and the basis of the plan of composition was an agreement which had been entered into between the irrigation district and the trustee, appellant here. The agreement was made August 28, 1945 (R. 62, case No. 11,632). On January 3, 1946 Judge Martin I. Welsh entered an interlocutory decree confirming the contract as a plan of composition (R. 50, 61, case No. 11,632).

The composition agreement recited that the debts of the district consisted of \$511,000 of interest bearing bonds, plus interest, and \$52,220.93 principal amount of warrants (R. 62, 63, case No. 11,632). The essential provision of the composition agreement was that the landowners should individually be entitled to redeem their respective parcels of land at stated figures as set forth in an exhibit called Exhibit "B" (R. 65, case No. 11,632) or failing to make such optional payment prior to April 24, 1947, the district

would undertake to acquire title to all such unredeemed land and convey the same to the trustee, together with other assets (R. 70, 71, 73, case No. 11,632). It should be understood and it will plainly appear from the composition agreement and the interlocutory decree that the so-called redemption figure being the amount for which the individual landowner concerned could redeem his land was not an "assessment" and was not in any way levied upon the particular lands involved. The plan of composition merely undertook to give each landowner an *option* to redeem his land from any past or future assessments for the indebtedness of the district upon paying the designated sum.

So far as the plan of composition is concerned, the land of the landowners may or may not have been encumbered with assessments.

Prior to the making of the plan of composition and prior of course to the entry of the interlocutory decree, the State of California acquired certain lands within the boundaries of the Baxter Creek Irrigation District (described at R. 5) by deed dated June 13, 1944, approved by the Director of Finance of the State of California August 28, 1944, and recorded November 14, 1944 in the records of Lassen County (R. 12).

The Fish and Game Commission was noted as the owner of this particular land in the plan of composition and in the interlocutory decree (R. 2, 3, 44).

The property of the state in question was acquired from Dakin Bros. (R. 18-20).

The assessment which had been levied by the Baxter Creek Irrigation District against these lands was \$52,839.12 (R. 36). On the other hand, the composition figure, that is to say the figure for which the state could redeem these lands under the composition plan was \$885.28 (R. 44).

The court in the bankruptcy proceeding specifically found that notice had been given to all the landowners as provided by the national bankruptcy act (R. 30, case No. 11,632).

The Order to Show Cause.

The State of California on January 13, 1947, applied to the court for an order to show cause, directed to the Baxter Creek Irrigation District and the trustee for creditors, why the land of the state should not be excluded from the operation of the plan of composition, and why the assessment levied should not be declared null and void (R. 4). The order to show cause applied for was issued on the same day by Judge Roger T. Foley of the U. S. District Court, and the application was submitted upon a stipulation of facts (R. 12, 34, 37).

The court below by its order dated and entered July 9, 1948, ordered "that the petition of the State of California be granted, that the land owned by it is excluded from the effect of the Interlocutory Decree of January 3, 1946, and the February 6, 1945, assessment levied thereon is declared to be null and void" (R. 47).

It is from this order that the appeal is taken.

Resume of the Stipulation of Facts.

A brief resume of the stipulation pertaining to the facts so far as pertinent is as follows:

The State of California acquired the land by deed dated June 13, 1944, recorded November 14, 1944 (R. 12).

The Board of Supervisors of Lassen County, California, passed a resolution in September, 1943, for the preparation of an assessment roll of the lands of the Baxter Creek Irrigation District. This resolution (R. 21) recited that a judgment was rendered by the United States District Court in favor of Pueblo Trading Co. against Baxter Creek Irrigation District for a sum of money, the judgment further providing that the Baxter Creek Irrigation District make provision for the payment of the judgment by levying assessments, and that upon the failure of the board so to do the Board of Supervisors of Lassen County should make such provision, whereupon the supervisors resolved to make the levy for the fiscal year 1943-1944 (R. 23). The levy was made for the judgment in the amount of \$43,542.16 and all outstanding bonded indebtedness in the amount of \$1,062,880.00. Notice that the assessment so made would become delinquent on February 28, 1944 was published (R. 13). This particular assessment roll *did not* include the lands of the State of California in question.

The judgment of the Pueblo Trading Co. referred to was entered March 20, 1940 in case No. 4195L (R. 14). The district had not levied any assessments against the lands of the district for payment of its

bond debt since 1927 (R. 15). The supervisors appeared in court and promised the court that they would levy an assessment and pursuant to their promise proceeded to make a levy upon certain lands. But the assessment so levied did not include the lands owned by the State of California. (These lands formerly were assessed to Dakin Bros. and so appeared on the assessment roll of the county (R. 15).) Plaintiff Pueblo Trading Co. applied to the court in September, 1944 for an order to compel the board of supervisors to levy an assessment upon these lands which had been omitted as well as other omitted lands, and on September 26, 1944 the board of supervisors were directed by the court to prepare a supplemental assesment roll and to proceed to make such levy (R. 16). Notice was accordingly published in December that a supplemental assessment roll had been prepared and that the supervisors would meet January 2, 1945 as a board of equalization (R. 16).

The land in question had been acquired by the state in August, 1944.

After the roll had been equalized the Board of Directors of the Baxter Creek Irrigation District, whose duty it had always been to make this assessment, proceeded to make the actual levy (R. 17, 25).

Subsequently notice was published that this real property would be sold unless the assessment should be paid prior to May 21, 1945 (R. 17). It will be observed that the delinquent tax list (R. 35) states plainly "Levied in the year 1944". The amount of the assessment required to be paid as shown by this

exhibit is \$52,839.12 (R. 36). The resolution of the district dated July 2, 1946 (R. 41) shows again that the assessment purports to be an assessment "levied by the District in 1944".

Resume of Dates.

Proceedings for assessment commenced by supervisors December, 1944; assessment actually levied by board February 6, 1945; property acquired by state August, 1944. Interlocutory Decree entered January 3, 1946; application for order to show cause January 13, 1947.

SUMMARY OF ARGUMENT.

The court made two rulings. It ruled: 1. That the lands of the state were not subject to the plan of composition; 2. Declared the assessment levied by the board of directors of the district null and void.

"This order was based in part upon an erroneous finding and assumption that "By the (interlocutory) decree the State of California through the Fish and Game Commission was assessed the sum of \$885.28." and in part upon an error in law in that the court determined that the assessment levied February 6, 1945, did not become a lien upon the lands until the following March, 1945, instead of holding, as we maintain, that it became a lien the First Monday in March, 1944.

As has been shown by the foregoing statement of the case, the actual assessment was not levied by the

interlocutory decree nor was it in the amount of \$885.28, but the assessment was levied by the Board of Directors of the Baxter Creek Irrigation District and was in the amount of \$52,839.12. It is our contention that the matter of the plan of composition became *res judicata* and that the time for appeal having elapsed and the Fish and Game Commission having been duly notified as shown by the record, could not a year later apply to the court for an order modifying the decree.

It is also contended that the court has no jurisdiction to declare void an assessment levied by the State of California through its public agency Baxter Creek Irrigation District, unless perchance it should have undertaken to do so in the case in which it ordered the assessment made, that is, the *Pueblo Trading Co.* case. This it did not do.

And we maintain that the court has made an error of law in construing the provisions of the Water Code in such a manner as to provide that the assessment finally levied in February, 1945 did not become a lien until the following March.

We maintain also that the decree takes the property of the creditors of the district without due process and without just compensation.

ARGUMENT.

- I. THE COURT ERRED IN FINDING AND HOLDING THAT THE BANKRUPTCY COURT HAD ASSESSED THE LANDS OF THE FISH AND GAME COMMISSION IN THE SUM OF \$885.28.

The assessment made upon the lands was made by the Baxter Creek Irrigation District as the result of an order in the case of *Pueblo Trading Co. v. Baxter Creek Irrigation District*, and was made February 6, 1945, and was in the amount of \$52,839.12 (R. 36).

The interlocutory decree provided "That said Plan of Composition attached to the Petition herein as modified in Finding XIX and paragraph 14 of this decree be and it is hereby approved, confirmed, adopted, and allowed * * *" (R. 55, case No. 11,632). Paragraph 14 which is found at R. 55, case No. 11,632, clearly shows that the item referred to is not an assessment, and the plan of composition itself plainly says "That the said Trustee * * * will accept from any individual landowner in the District in full settlement of the liability of such land for the payment of all the outstanding bonds, coupons and warrants of said District and judgments thereon against said District, the amount set forth in Exhibit 'B' and labeled 'Total Amount' opposite the description of such land * * *" (R. 65, case No. 11,632).

It is apparent that the court erred in holding that the interlocutory decree levied any assessment in the amount of \$885.28, or in any other amount.

II. THE APPLICATION OF THE STATE WAS TOO LATE.

The interlocutory decree was entered January 3, 1946 (R. 61, case No. 11,632). The application for the order to show cause was made January 13, 1947 (R. 5). We have shown that the Fish and Game Commission had due notice of the hearing on the interlocutory decree (R. 30, case No. 11,632), and that no objection thereto was made. The time for appeal had expired (Sec. 24, Bankruptcy Act 1898).

The application of the state was therefore too late. It was bound by the decree.

III. THE COURT WAS WITHOUT JURISDICTION TO DECLARE NULL AND VOID THE ASSESSMENT OF FEBRUARY 6, 1945, AND ITS ORDER IN THAT RESPECT WAS AN INTERFERENCE WITH THE SOVEREIGNTY OF THE STATE OF CALIFORNIA.

The assessment which we refer to is the one made February 6, 1945 by the Board of Directors of the Baxter Creek Irrigation District and which was in the amount of \$52,839.12.

Chapter IX of the Bankruptcy Act specifically provides:

(i) Nothing contained in this chapter shall be construed to limit or impair the power of any state to control, by legislation or otherwise, any municipality or any political subdivision of or in such State in the exercise of its political or governmental powers, including expenditures therefor.”—11 U.S.C.A. 403 (i).

U. S. v. Bekins, 304 U. S. 27, 58 S. Ct. 811.

IV. THE ORDER OF THE COURT CONSTITUTES THE TAKING OF THE CREDITORS' PROPERTY WITHOUT DUE PROCESS AND WITHOUT JUST COMPENSATION.

The composition contract in this case was an agreement between the creditors and the district and landowners by which the creditors agreed to surrender their bonds totaling in value over a million dollars on consideration of the various landowners paying the assessment. To take the Fish and Game Commission out of the plan of composition thus diminishes the amount received by the creditors. Furthermore, the declaration that the assessment made by the Board of Directors of the Baxter Creek Irrigation District without regard to any clauses in the composition agreement permitting the correction of errors takes the property of the creditors without due process of law and without just compensation. We submit the court erred, but the farthest the court should have gone in any event was to declare that the Fish and Game Commission was no part of the composition proceeding, but to go back and declare that the assessment made by the Board of Directors was null and void was an invasion of the creditors' rights, if the other part of the order was not such invasion.

We do not think it is at all clear that an irrigation district cannot tax property of another state agency. There are several reasons for this: (a) The provision in the constitution relating to taxation does not refer to assessments. (b) An irrigation district is another agency of the state. (c) There is a contract between the state and the bondholders for the payment of the bonds.

Under the provisions of the California Irrigation District Act the bonds are payable out of assessments levied against the the lands. This bond is a contract between the state and the lenders of the money. The bond has the great seal of the state upon it and it is certified as approved by the state for investment by savings banks and the like and may be used in many cases to satisfy the public obligation to post a bond. It is in effect a debt of the state payable out of assessments levied upon certain land. The state cannot now void its own obligation, but in particular it cannot wipe out the lien of the assessment which lien became effective the first Monday in March 1944.

Taxes and assessments are two different things. This is shown by Political Code Section 3456 (a) where it is provided that assessments levied by a reclamation district shall include all lands owned by the State of California or by any city, county, etc. If assessments and taxes were the same this section of the Political Code would be unconstitutional.

In *A. T. & S. F. Railway Co. v. Reclamation Dist. No. 404*, 173 Cal. 91, 92, it is said:

“Assessments of the kind here involved do not have the character of a tax so as to be collectible by execution or levy upon the general property of the owner of the land against which the assessment is made. Such assessments may be made upon the particular property because the improvement to be made with the money raised in that manner is presumed to benefit the property assessed to an amount at least equal to the charge against it * * * That such a charge imposed by

a local public corporation of that character is an assessment and not a tax was directly decided in *San Diego v. Linda Vista I. D.*, 108 Cal. 193 (35 L.R.A. 33, 41 Pac. 291).''

In *Los Angeles Co. F. C. Dist. v. Hamilton*, 177 Cal. 119, 129, the court stated:

“* * * In *Doyle v. Austin*, 47 Cal. 353, an act (Stats. 1871-72, p. 911), providing for the opening of Montgomery Avenue, in the City of San Francisco, was assailed upon the ground, among others, that it imposed a ‘tax’ in a special improvement district without following the provisions of the constitution with reference to the assessment and levy of taxes. The court answered the contention in these words: ‘It sufficiently appears on the face of the act that the whole scheme contemplates an assessment and not a tax. The two are essentially different in their nature, and designating as a tax that which in its elements is an assessment can have no effect in determining whether it is one or the other. The question must be decided by the nature of the imposition, and not by the mere name by which it is called.’ There are many other instances where the word ‘tax’ has been used to designate a special assessment. (*Wagner v. Baltimore City*, 239 U.S. 207 (60 L. ed. 230, 36 Sup. Ct. Rep. 66); *Yeatman v. Crandall*, 11 La. Ann. 220; *Daily v. Swope*, 47 Miss. 367.) * * *”

In *Hagar v. Sup. of Yolo Co.*, 47 Cal. 222, 234, it is said:

“* * * In my opinion the act in question violated none of these provisions, and the authority to compel local improvements at the expense of those

to be immediately benefited, is not taxation, though referable to the taxing power.”

In *Boxler v. County of Sacramento*, 59 Cal. 698, 702, the court said:

“* * * ‘Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for State and municipal purposes, and governed by principles that do not apply generally.’ (Cooley on Taxation 416-417.) ‘These assessments are made for local improvements, such as grading streets, constructing sewers therein, draining swamps, marshes, and other low lands for stagnant water, etc., and the principle upon which they are levied is ‘that the territory subjected thereto will be benefited by the work.’ (Litchfield v. Vernon, 41 N.Y. 133.)”

In *Turlock Irr. Dist. v. Williams*, 76 Cal. 360, 370, it is stated:

“The nature of the assessment is one for local improvements, which, however, eventuate in the advancement of the public good, and such assessments and collections can be lawfully made.

“It is ‘clear that those clauses of the constitution which provide that taxation shall be equal and uniform, and which prescribe the mode of assessment, and the persons by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements’. (Hagar v. Supervisors of Yolo County, 47 Cal. 222.)”

In *In re Oroshi Public Utility Dist.*, 196 Cal. 43, 53, the court said:

“* * * The other distinguishing feature is that the exactions which such districts may enforce in order to carry out their purposes are in the nature of assessment or taxes for local benefits, to be spread on the property in the districts in proportion to the peculiar advantage accruing to each parcel from the improvement. (*Pasadena Park Imp. Co. v. Leland*, 175 Cal. 511, 512 (166 Pac. 341).) Such an exaction is generally in the form of a special assessment, but even if it is in the form of a tax it is nevertheless an assessment for local benefit. (*City of San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, 193 (41 Pac. 291).)”

In *State v. Board of Commissioners of Cascade County (Mont.)*, 296 Pac. 1, 14, the court said:

“The impositions imposed upon the land within an irrigation district for the purpose of irrigating the lands therein are special assessments.

“We hold, therefore, that irrigation district assessments are not taxes, as that term is used in section 2215.

“The only justification for these added impositions is the benefit accruing to the lands upon which the added burden is placed.” (Authorities)

“The theory upon which the assessments may be levied for special improvements is ‘that the property assessed will be enhanced (in value) to the extent of the burdens imposed’.”

In *Oregon Shortline Railroad Co. v. Pioneer Irr. Dist.*, (Ida.), 102 Pac. 904, 915, the court said:

“The principle involved in assessments for local improvements is different from that underlying

general taxation. The organization of the district, in the first instance, was intended for local improvement, and the assessment levied is for the purpose of carrying out the local improvement; and we do not understand the rule to be that the general method of fixing values and making assessments against property for general tax purposes applies to levies made for local improvements.”

In *Interstate Trust Co. v. Montezuma Valley Irr. Dist.*, (Colo.), 181 Pac. 123, 124, the court said:

“* * * Indeed, it appears that the courts of all jurisdiction which have passed upon irrigation district laws have either expressly or by necessary implication held the assessments levied thereunder to be local improvement taxes.

“Plaintiff contends, however, that irrigation district assessments, being levied annually throughout the life of the district, are for that reason inconsistent with the theory that the taxes are for local improvement. From a legal viewpoint this circumstance does not affect the character of the assessments. The difference between the assessments for the paving of streets and one for the irrigation of land is physical and not legal. In the first instance the result is accomplished and the benefits conferred when the paving is completed; in the second, in order to render the benefit a continuing one the assessment in the very nature of things must also be continuous. But this fact cannot be held to change that which is in fact a local improvement assessment into a general tax.”

Public property may be assessed.

In *City of Pasadena v. Chamberlain*, 1 Cal. App. (2d) 125, 132, (hearing by Supreme Court denied), the court said:

“* * * As the court observed in *Inglewood v. County of Los Angeles*, 207 Cal. 697: ‘There is a broad and well recognized distinction between a tax levied for general governmental or public purposes and a special assessment levied for improvements made under special laws of a local character * * * While these local assessments are taxed under a taxing power, they are not taxes in the ordinary understanding of that term; * * * ; consequently, the usual exemptions from taxation will not preclude the property exempt being subject to them.’ ”

In *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, 194, 196, it is said:

“It cannot be doubted, in view of the well-recognized distinction between a tax and an assessment, not only in common parlance, but in repeated decisions of this court prior to the adoption of the constitution of 1879, that if it had been intended to restrict the power of the legislature in regard to assessments for local purposes, or that the proviso contained in section 1 of Article XIII should extend to assessments as well as ‘taxation’, that apt words to express such intention would have been used. If this be true it follows that there is at least no express exemption of any property from local assessments, while the act under which said irrigation district was organized provides for an annual assessment upon

the real property of the district; 'and all the real property in the district shall be and remain liable to be assessed for such payments, as hereinafter provided'. (Stats. 1887, sec. 17, p. 37).

"In Cooley on Taxation, second edition, page 650, in speaking of property subject to assessment, the learned author says:

" 'It has been shown in another place that, while these local assessments are laid under a taxing power, they are not taxes in the ordinary understanding of that term, and that, consequently, the usual exemptions from taxation will not preclude the property exempted being subjected to them.' And at page 653 the same author adds: 'Even public property is often subjected to these special assessments; there being no more reason to excuse the public from paying for such benefits than there would be to excuse from payment when property is taken under the eminent domain.' "

In *Conley v. Hawley*, 2 Cal. (2d) 23, 26, the court said, quoting with approval from California Jurisprudence:

"While local assessments are made under the taxing power, they are not taxes in the ordinary understanding of that term, or within the meaning of the word as used in the provisions exempting lands of the state from taxation. Public policy, of course, forbids the application of general law to property held in trust for public purposes, such as public buildings, and necessary lands upon which they stand. But the rule goes no further, and whenever lands, so owned by some public

agency of mandatory of the government, are not in use in the performance of the public function, such lands, in the absence of constitutional or legislative restrictions, may justly be compelled to bear their part of the expense which goes directly to increase their values. So lands of the municipality situated within an irrigation district are not expressly exempt from assessment by such district, but there may exist an implied exemption, dependent upon the use to which the property is put. Likewise lands of a school district which are held as an investment may be assessed for improvements the same as those of any private owner."

In *Inglewood v. County of Los Angeles*, 207 Cal. 697, 702, 707, the court said:

"There is a broad and well-recognized distinction between a tax levied for general governmental or public purposes and a special assessment levied for improvements made under special laws of a local character. (*San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189 (35 L.R.A. 33, 41 Pac. 291); *City Street Improvement Co. v. Regents, etc.*, 153 Cal. 776 (18 L.R.A. (N.S.) 451, 96 Pac. 801).) As to the former, that is, a tax for governmental purposes, property of a municipality is exempt therefrom by express provision of the constitution of this state and of the Political Code. (Const., sec. 1, art. XIII; Pol. Code, sec. 3607.) These provisions of the constitution and code, however, do not apply to special assessments, and property of a municipality or other property publicly owned may, under certain circumstances, be made liable for special assess-

ments. (*City of San Diego v. Linda Vista Irr. Dist.*, supra; *City Street Improvement Co. v. Regents, etc.*, supra; *Los Angeles County Flood Control Dist. v. Hamilton*, supra; *City of Pasadena v. McAllaster*, 204 Cal. 267 (267 Pac. 873).) The rule is aptly stated by Judge Cooley in the following language: 'While these local assessments are taxed under a taxing power, they are not taxes in the ordinary understanding of that term, and that, consequently, the usual exemptions from taxation will not preclude the property exempt being subject to them.' (Cooley on Taxation, 2d ed., p. 650.) * * *

"As we have already shown, public property of a municipality, that is, property owned by such municipality and by it devoted to public use, is liable for special assessments for public improvements only in case there is a positive legislative authority therefor. * * *"

In *State v. Columbia Irr. Dist.* (Wash.), 208 Pac. 27, 30, the court had before it this question:

"Is property sold to Stevens County for delinquent general taxes subject to future assessments for payment on principal and interest on outstanding bonds?"

The court said:

"* * * We do not see how the fact that the county's title is acquired by tax foreclosure and subsequent to the organization of the district would make the status of the property any different than that which the county may have acquired from some other source, though the district assessments then in existence are foreclosed by the lien

for general taxes. * * * To exempt this land would in effect withdraw it from the district and nullify the provision of section 6432 referred to. The only provision made for withdrawal is by application to the board of directors. * * *

“It should be noted in this connection that the receipt of water or other benefits conferred by the irrigation district is not dependent upon the payment of taxes. But all the land within the District continues to share in the benefits. We conclude that these lands are subject to future assessments.”

Note, 90 A.L.R. 1137:

“It is a general rule, to which there are but few exceptions, that a constitutional or statutory exemption from taxation is to be taken as an exemption from ordinary taxes only, and does not include special assessments for local improvements. * * *”

In the *Inglewood* case the court said, referring to the bondholders, that they purchased their bonds of the several districts with the full knowledge that the enabling acts under which the bonds were issued contained no provision authorizing the assessment of municipal property. The bondholders took their bonds subject to the statutory law, but did not contract for every judicial decision.

In *City Street Improvement Co. v. Regents of the University of California*, 153 Cal. 776, the Supreme Court had occasion to hold that an assessment for street improvement against lands held by the state

university which were not yet used for educational purposes were subject to assessment.

In *San Diego v. Linda Vista I. D.*, 108 Cal. 189, 196, the court said:

“As we have seen, there is no express exception covering this property, and implied exemption should not be extended to property which is not held or used for municipal or governmental purposes. In *Essex County v. Salem*, 153 Mass. 143, it is said: ‘We are of the opinion that in the absence of any express exemption of the property of counties from taxation, an exemption can be applied only when the property is actually appropriated to public uses’ ”.

The court also said that if the Legislature may empower a city to sell its pueblo land as in *Ames v. City of San Diego*, 101 Cal. 390,

“no reason is perceived why the legislature may not make it liable for an assessment which is not imposed as a burden but as its proportion of the expense incurred to secure a local benefit.”

In *City of Pasadena v. Chamberlain*, 1 Cal. App. (2d) 125, 133, the court said that the reason why property remains subject to assessments levied against it until paid, even though the city enters and devotes the land to public use, lies in the fact that the improvement act cited expressly subjects the land within the district to the assessments levied to pay installments due on improvement bonds. The court declared that this is not taxation of public property but merely a provision whereby the improvement district may

be created, and in this case held that the city was in the position of having consented to the assessment by entering upon and taking the land which was so assessed.

There is no showing that the land in question is used by the Fish and Game Commission for a public purpose.

The appellees will of course rely upon the *Inglewood* case. In that case the court said:

“In their behalf we will say that no complaint has come from any of said bondholders as far as the record in this case shows. The bond holders appear to be perfectly content with the situation as it is. Neither are the landholders in any of said districts making complaint regarding the exclusion of said public lands from assessments to pay for the improvements carried on in the several districts. The point is raised by the county of Los Angeles only, the respondent herein. But conceding that respondent may properly raise the question, we are convinced that its position regarding the validity of the assessments involved herein is untenable and finds no support in the law of this state.”

Thus the court was honest to admit that none of the bondholders had appeared in the action and presented their views on the subject.

If the position of appellees were carried to an extreme, it would seem that the state could buy up all the land in an irrigation district and leave the bondholders without a remedy to enforce payment by

special assessment or otherwise. In the *Inglewood* case, as already pointed out, neither the taxpayers nor bondholders were complaining about the increased burden of taxation or loss of security. The chances were very remote of any loss to the bondholders there and the tax burden very slight on the remaining taxpayers of the city. However, in the present case the loss to the bondholders of the right to assert the lien on the land is immediate and direct, and may well afford sufficient reason for the court to consider the question anew.

This point may be merely moot, for this court cannot we submit pass upon the validity of any future assessments nor nullify any already made. The Fish and Game Commission seeks to have its parcel excluded from the plan. It does not have to and did not redeem. Its title will still be bad. It will have to quiet title against the trustee if it seeks to maintain its position.

Another distinction may be found in that in the *Inglewood* case the land was bought at a time when the district was solvent and at no time were the bondholders in jeopardy of losing their money because of the city's purchase of the land for municipal purposes. Compare the present case where the state bought the lands when the district was hopelessly insolvent and the bondholders desperately needed every asset of the district.

It may well be that a bondholder assumes the risk that the state or some public agency may need a site

for a city hall or a postoffice and that land bought for that public purpose will be withdrawn from assessment to provide revenue for payment of his bonds. But the assumption becomes absurd that the bondholder expects that after the district is insolvent then the state will come in and buy up land for some purpose and claim that it should take it free of any lien.

That the State contracted with the bondholders to levy and collect assessments is shown.

The California Irrigation District Act contained a specific provision that all lands in the district shall remain liable to be assessed for the bonds. We don't know of any more inclusive statement than that all lands shall be and remain liable. Section 25219, Water Code.

V. THE COURT ERRED IN HOLDING THE LIEN OF THE ASSESSMENT LEVIED FEBRUARY 6, 1945 BECAME EFFECTIVE THE FIRST MONDAY IN MARCH, 1945.

To review briefly the facts, we have shown in the Statement of the Case that the assessment was merely a supplemental assessment. The original assessment made by the Board of Supervisors was for the year 1943-44, and was made about a year previously, and omitted the lands of Dakin Bros. (now the State's lands). The supervisors undertook to levy a supplemental assessment. This was not only pursuant to the order of the court but was pursuant to Section 26500 of the Water Code of the State of California, which reads as follows:

“If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board.”

Proceedings for this assessment which may be said to be for the year 1944 were commenced December 14, 1944 (R. 16). The assessments were equalized January 2, 1945 and the assessment was actually levied on February 6, 1945 (R. 17).

Now the question involved under this point is whether the lien of this assessment relates back to the first Monday in March, 1944, which would be prior to the time that the state took title to the property in August 1944, or whether the assessment levied in February of 1945 did not become a lien until the first Monday in March, 1945.

Appellants refer to the sections of the Water Code, Sections 26500-26529, which are set forth in the Exhibit A as showing the procedure which is supposed to take place when the board of directors of an irrigation district fails to levy an assessment. It will be seen from perusal of these sections that the supervisors are required to levy the assessment upon the failure of the board of directors of the irrigation district. It will also be seen that all acts of the supervisors are in truth and in fact the assessment of the board of directors of the irrigation district and are

done "with the same effect". (Section 26500 Water Code. See Exhibit A.)

It is quite obvious that if the board of directors of an irrigation district fail to make their assessment in the time required by the statute, the supervisors, if they follow normal routine would not be able to get the assessment performed or done until perhaps after January 1st, but it would nonetheless be the assessment for the year 1944. Section 26079 of the Water Code provides:

"If any duty relating to the assessment, levy, and collection of assessments is performed subsequent to the latest time it should have been performed, the time within which all duties consequent upon the performance of the preceding duty are to be performed shall be extended to allow the elapsing of the intervals required to elapse between the performance of the duties, and assessments shall not become delinquent for at least 30 days after the first publication of notice that the assessments are due and payable."

It is thus seen that the time for performance of the various steps in the assessment and levy are *advanced* so as to give *like effect* as if done in the time specified originally.

Interpretation of the statute.

The vital section of the Water Code involved is Section 25925 which reads as follows:

"The annual district assessment upon land is a lien against the property assessed from and after

the first Monday in March of the year in which the assessment is levied.”

The court in its order stated that the term “year” should be given its common and usual definition of a calendar year, and states that throughout the Water Code references made to a “calendar year” are persuasive in construing the word “year” to mean a “calendar year”. (R. 46.)

It is true that the Water Code provides that the annual assessment is to raise moneys for the calendar year (Water Code Section 25650-2), while the Revenue and Taxation Code of the State of California provides for levies for the fiscal year. The word “assessment year” appears, however, in Section 25801 of the Water Code, and thus in referring to the mechanics of making the levy, it may be quite apparent that the year of enforcement is different from the year for which the levy is made to produce the funds.

It is obvious that the Water Code is not the exclusive source of law to which we are to look in matters concerning irrigation districts. Section 117 of the Revenue and Taxation Code of the State of California reads as follows:

“ ‘Lien date’. ‘Lien date’ is the time when taxes for any fiscal year become a lien on property.”

Now it would hardly be said that that section does not refer to and define the lien date set forth in Section 25925 of the Water Code.

Section 118 of the same code reads as follows:

“ ‘Assessment year’. ‘Assessment year’ means the period beginning with a lien date and ending immediately prior to the succeeding lien date for taxes levied by the same agency.”

This is entirely reasonable and we submit that it is a binding statement of law construing the meaning of the words “assessment year”. It is therefore justifiable to argue that the assessment levied between the first Monday in March, 1944 and the first Monday in March 1945 would be a lien on the land from and after March, 1944.

There are two other sections in the Revenue and Taxation Code which are pertinent. Section 2192 reads as follows:

“All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied.”

Section 24 reads as follows:

“No act in all the proceedings for raising revenue by taxation is illegal on account of informality or because not completed within the required time.”

Thus we have a positive declaration that the proceedings commenced in 1944 for the levying of these assessments upon the lands of the state, although the levy was not completed until 1945, should not be illegal on account of that informality, or because not completed within the required time which would be supposedly 1944.

Attention is called to the fact that the assessment proceedings were commenced by the County of Lassen under the provisions of Section 26500 of the Water Code which provides that if a board of an irrigation district neglects to carry out its duties of levying assessments "in any year" the board of supervisors shall perform the duties "in the same manner and with the same effect as if they had been performed by the board". Now it is perfectly obvious that a board of supervisors could not complete performance of such duties so as to levy the tax within the year let us say 1944 after the failure and neglect of the board of directors of the district to carry out its duties. Yet Section 26500 provides that it shall do so "with the same effect as if they were performed by the board". This section is persuasive that the intent of the section with relation to the lien date was that the word "year" should apply to the year from the first Monday in March, 1944.

The present assessment was levied February, 1945, so it is obvious that the lien which went into effect the first Monday in March, 1945, does not refer to the assessment which had already been levied. The assessor is supposed to assess all lands between March and June. The court's construction would leave two months when no assessment could be made except to relate to the following March lien.

In the present case the February assessment could not possibly relate to the year 1946 because no current assessment for the calendar year 1946 was yet due, and the assessor and board were not authorized

to make any for then but only for the year 1945. No default had yet been made by the board of directors as to the 1946 assessment.

It is our position that the assessment year runs from March to March, although the assessment made is for the calendar year following.

City of Santa Monica v. Los Angeles County, 15 Cal. App. 710, 115 P. 945. That was an action brought to recover taxes paid under protest. The property assessed was privately owned property on March 1, 1903. Thereafter, but before such assessment was levied, the city of Santa Monica acquired said property. The court held with the defendant in said action that the lien of said taxes attached on the first Monday in March of said year and that "the plaintiff, when it acquired this land, took it subject to the lien for county purposes to the same extent as would a private purchaser". If a city must pay county taxes on property bought after the first Monday in March but before the assessment is levied, it would seem to follow that the state should do likewise.

See

U. S. v. Aho, 68 Fed. Sup. 359 and *U. S. v. Florea*, 68 Fed. Sup. 367.

If objection is made that the assessment and levy were not made at the normal time of year, perhaps the validating act of 1945 cured any such possible defect. See Chapter 1134, Stats. 1945, reading in part as follows:

“Section 1. As used in this act ‘Taxing agency’ includes the State, county, and city. ‘Taxing agency’ also includes every district that assesses property for taxation purposes and levies taxes or assessments on the property so assessed.

Sec. 2. As used in this act ‘Revenue district’ includes every city and district for which the county officers assess property and collect taxes or assessments.

Sec. 3. Every act and proceeding heretofore taken by any taxing agency or revenue district or the officers thereof relative to the preparation, transmitting, computing, determining or fixing the budget or the tax rate or rates of any taxing agency or revenue district, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances, are hereby confirmed, validated and declared legally effective.”

In the case of *United States v. State of Alabama*, 313 U.S. 274, 61 S. Ct. 1011, Mr. Chief Justice Hughes, speaking for the Supreme Court, said:

“There is no question, however, as the government concedes, that the state statute purports to impose a lien as of October 1, 1936 for the taxes which by the process of assessment were to be made payable for the tax year 1937. October first is fixed as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes laid. There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes

for the ensuing year as these are fixed by the defined statutory method.”

The court holds:

“We make no exception of the tract conveyed to the United States on the tax day, October 1, 1936, as we think the state statute, as contended by the State, is to be deemed effective from the moment the tax day began.”

An attempt to wipe out this lien would be to deny to the creditors of the state, the bondholders in this case, a vested right to property.

We refer to an official opinion on file with the Irrigation Districts Association of California and given by counsel for the South San Joaquin Irrigation District July 24, 1941 in a non-controversial matter. We have copied portions of this opinion and set them forth in Exhibit B attached hereto and have italicized the most pertinent portions showing the opinion of counsel that the lien date refers to the tax levied for the *following calendar year* and citing and relying upon Section 2192 of the Political Code. (The opinion refers to sections in the former “the California Irrigation District Act” which was codified into the Water Code in 1943.)

We respectfully submit that the assessment levied by the irrigation district became a lien on the land in question on the first Monday in March, 1944, and that when the Fish and Game Commission acquired this property it took it subject to the lien of those assessments.

CONCLUSION.

It is respectfully submitted that the decision below should be reversed.

Dated, Turlock, California,
November 8, 1948.

W. COBURN COOK,
Attorney for Appellants.

(Exhibits A and B Follow.)

Exhibits.

EXHIBIT A

Water Code, Section 26500:

“If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board.

26501. The applicable part of the equalized county assessment rolls of the affected counties shall be the basis of assessment for the district when its assessments are levied pursuant to this article.

26502. If any land subject to assessment for the purposes of the district does not appear upon a county assessment roll used as the basis of assessment for the district, the land omitted shall be forthwith assessed by the county assessor of the county in which it is situated upon an order of the board of supervisors making the assessment, and a description of the property omitted shall be written in the roll prepared for the district assessments.

26503. The board of supervisors shall meet and equalize each assessment made pursuant to this article with the assessment of other land in the district. The same notice shall be given by the board of supervisors of a meeting for the purpose of equalizing the assessment to be made as herein directed as is provided to be given by a district secretary when a board is to meet to equalize assessments.

26504. All expenses incurred in levying the assessment shall be borne by the district concerned. Unless the expenses are paid within 60 days from the time when a demand for them is made, they shall be collected by an action commenced by the district attorney of the county whose board of supervisors prepared the assessment roll.

26525. In case of the neglect or refusal of the collector of any district to perform the duties imposed upon him, the tax collector of the office county shall perform his duties and be accountable therefor upon his official bond.

26526. When any county tax collector collects any assessments for any district, he shall pay the proceeds to the county treasurer of the office county.

26527. As to money collected by the county tax collector and paid to the county treasurer, the county treasurer shall perform the duties ordinarily imposed on the treasurer of a district and be accountable therefor upon his official bond.

26528. The county treasurer shall place the money of the district in a special fund to the credit of the district and shall disburse it to the proper persons for the purposes for which the assessments raising it were levied.

26529. The county treasurer shall not pay any part of the money to the treasurer of the district until the county treasurer is satisfied that all of the valid obligations for which the assessments were levied and for which payment has been demanded have been paid.

EXHIBIT B

Law Offices of
RUTHERFORD, JACOBS, CAVALERO
& DIETRICH

Stockton Savings & Loan Bank Building
Stockton, California

July 24, 1941

Mr. F. S. Thornton
Assessor-Collector
South San Joaquin Irrigation District
Escalon, California

Re: Delinquent Assessment Notice.

Dear Mr. Thornton:

* * * * *

Our conclusion from all of the above is that the form of notice for the delinquent assessment list which you left with us, and which we are herewith returning to you, is adequate and sufficiently complies with Section 42 of the Irrigation District Act, with the exception, however, that the word "fiscal" in the sixth line of the notice should be changed to the word "calendar". We can find no reference anywhere to the statute which you said is supposed to exist which fixes some particular period as the "fiscal" year for an irrigation district. On the contrary, Section 39 of (Ch. 2 Art. of Part. 10, Div. II, W.C.) the Irrigation District Act, which appears to be the controlling section with reference to the levy of assessments by an irrigation district, refers solely to "the next ensuing calendar year", and there does not seem

to be any room left for any interpretation that the assessment that is levied is for any other period other than "the next ensuing calendar year". Inasmuch as Section 39 uses the word "calendar" throughout, and inasmuch as the word "fiscal" is generally used in connection with the establishment of a year other than a calendar year, we believe that it would lead to possible confusion if the word "fiscal" is used.

There does exist, however, in the law of California, a constitutional definition of the term "fiscal year" and it may be that in the discussions that you have heard reference was being made to this definition. It is Article XX, Section 5 of the Constitution of California and reads as follows:

"The Fiscal Year. The fiscal year shall commence on the first day of July."

However, it has been held that the mere fact that a statute designates the fiscal year as ending on some other date does not render the statute void where the intent was to refer to the period when the assessor should commence assessing property for taxes. (See *People v. Todd*, 23 Cal. 181.) In the case cited, it was held that an act legalizing assessments for taxes for the fiscal year ending on the 1st day of March is not void because the constitution provides that the fiscal year shall commence on the 1st day of July, but that the word "fiscal" in the act may be treated as surplusage. In our problem, we have a specific act, to wit, the California Irrigation District Act, which regulates our assessment procedure. Section 39 of that act which sets up the period for

which the assessment is to be levied states that it shall be for the "next ensuing calendar year". It appears to us, therefore, that, for our purposes, we are governed by the Irrigation District Act which sets up our specified procedure rather than by the definition of a fiscal year which appears in the constitution and inasmuch as the specific law which controls us describes our period as a "calendar year", we believe that for the sake of consistency and in order to avoid confusion, we should in our notices refer to said period as "calendar year" as provided in Section 39.

* * * * *

As a matter of interest, because it all came up in our discussion, we might review with you our understanding of the assessment procedure. Section 35 of the Irrigation District Act states that the assessor must between the first Monday in March and the first Monday in June of each year assess all land in the District in the manner in said section set forth. Thereafter, as provided in Section 37 of the Irrigation District Act, on or before the first Monday in August in each year the assessor must complete his assessment book and deliver it to the Secretary of the Board who must immediately give notice thereof and of the time when the Board of Directors will sit as a Board of Equalization by publication at least two times in a newspaper in the County in which the office of the district is located. Said notice shall be published at least twenty days, and not more than thirty days, before the time fixed for the meet-

ing of the Board of Directors as a Board of Equalization. Thereafter, pursuant to Section 38 of the Irrigation District Act, the Board of Directors upon the date specified in the aforesaid notice meet as a Board of Equalization and continue in session from time to time as long as may be necessary, not to exceed ten days, exclusive of Sundays, to hear and determine any objections to the valuation, acreage, or any matter pertaining to the assessment that may come before them and the Board may make such changes thereof as may to them seem just. The Secretary of the Board shall be present during its session as a Board of Equalization and make all changes ordered in the assessment book and within ten days after the close of the session he shall have the total values as finally equalized by the Board extended into columns and added.

Thereafter, pursuant to Section 39 of the Irrigation District Act, the Board of Directors shall within fifteen days after the close of its session as a Board of Equalization levy an assessment upon the lands within the District in an amount sufficient to meet the purposes specified in said Section 39.

Pursuant to Section 40 of the Irrigation District Act, the assessment upon land is a lien against the property from and after the first Monday in March for any year. This we interpret to refer to March of the year in which the assessment is levied. In other words, the assessment which will be levied by your Board of Directors in the near future for the purposes of the District throughout the year 1942 is

a lien against the property assessed from and after the first Monday of March in 1941. This necessarily follows due to the fact that pursuant to Section 41 of the Irrigation District Act the whole assessment, or when proceeding under Section 41c of said act when the first installment of said assessment, will become delinquent on the last Monday of December, 1941 and obviously it would be impossible for the assessment to become delinquent if it were not already a lien, so the reference to March in Section 40 necessarily must mean, in the example given, March, of 1941, that being the year in which the assessment is made, and not March of 1942, which is the year that the assessment made covers.

* * * * *

With kindest regards, we are,

Very truly yours,

Rutherford, Jacobs, Cavalero & Dietrich

PC:BG

By Philip Cavalero

P. S. In addition to what we have already hereinabove set forth, there is another good reason which, in our opinion, is conclusive and permits you to disregard the definition of a fiscal year set forth in Article XX, Section 5 of the Constitution of California. This reason is based upon the language contained in Article XI, Section 13 of the California Constitution, which, after stating that the legislature shall not delegate certain powers to certain agencies, specifically excepts irrigation districts, reclamation districts and drainage districts and states that as to such districts the legislature shall have the power to

provide for their supervision, regulation and conduct in such manner as it may determine. From this, it follows that the legislature has the authority to enact the California Irrigation District Act and to provide in said act fully and completely for the supervision, regulation and conduct of the affairs of an irrigation district. In view of the fact, therefore, that the legislature has so acted and has provided the irrigation district with a specific law to follow, it seems conclusive that the law which the irrigation district must follow is the law which the legislature has constitutionally provided for it, which in our case brings us back to the point that in so far as an irrigation district is concerned its tax year is the calendar year specified in Section 39 of the Irrigation District Act.

Article XI, Section 13 of the California Constitution reads as follows:

“The legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever, except that the legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state. (Amendment adopted November 3, 1914).”

Also, as a further conclusive argument for our conclusion hereinabove expressed that your assessments attach as a lien against the property in March of the year preceding the year for which said assessments are levied, we call your attention to Section 2192 of the Revenue and Taxation Code which states as a general principle that all tax liens attach annually in March preceding the fiscal year for which said taxes are levied. The fact that in the Irrigation District Act we have no reference to a "fiscal" year but rather to a "calendar" year is immaterial. They both mean the same thing, to wit, the year for which the tax is levied. Section 2192 of the Revenue and Taxation Code reads as follows:

"All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied. (Enacted 1939)."

P. C.

No. 12033

United States
Court of Appeals
for the Ninth Circuit

ESTATE OF H. M. HOLLOWAY, Deceased,
HARVEY S. HOLLOWAY, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Upon Petition to Review a Decision of The Tax Court
of the United States

FILED
OCT 5 - 1948

PAUL P. O'BRIEN,
Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:

A. CALDER MACKAY,
ARTHUR McGREGOR,
HOWARD W. REYNOLDS,
ADAM Y. BENNION.

For Respondent:

E. A. TONJES.

Docket No. 11427

H. M. HOLLOWAY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Amended caption: (See order of 3/29/48) Estate
of H. M. Holloway, Deceased, Harvey S. Holloway,
Executor. Year 1944.

DOCKET ENTRIES

1946

June 28—Petition received and filed. Taxpayer notified. Fee paid.

July 1—Copy of petition served on General Counsel.

Aug. 20—Answer filed by General Counsel.

Aug. 20—Request for place of hearing at Los Angeles, Calif. filed by General Counsel.

Aug. 23—Notice issued placing proceeding on Los Angeles, Calif. calendar. Service of answer and request made.

1947

Sept. 30—Hearing set Dec. 1, 1947, Los Angeles.

Dec. 2—Hearing had before Judge Disney on merits. Petitioner's motion to substitute the parties granted. Motion to substitute the parties petitioner and stipulation of facts filed at hearing. Briefs due 1/10/48; replies 2/1/48.

Dec. 19—Transcript of hearing 12/2/47 filed.

1948

Jan. 8—Brief filed by General Counsel.

Jan. 9—Brief filed by taxpayer. Copy served.

Feb. 2—Reply brief filed by taxpayer. Copy served.

Feb. 3—Copy of motion served on General Counsel.

Mar. 29—Order amending caption to read, "Estate of H. M. Holloway, Dec'd., Harvey S. Holloway, Executor," entered.

May 10—Order sustaining objections to Lang's declarations in part and overruling in part, entered.

May 10—Order amending caption to read, "Estate of H. M. Holloway, Dec'd., Harvey S. Holloway, Executor," entered.

May 13—Findings of fact and opinion rendered, Judge Disney. Decision will be entered for the respondent. 5/13/48 Copy served.

May 13—Decision entered, Judge Disney, Div. 4.

June 11—Motion to vacate decision filed by taxpayer. 6/15/48 Denied.

1948

June 11—Motion for reconsideration with memorandum attached filed by taxpayer.
6/15/48 Denied. [1*]

Aug. 9—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, filed by taxpayer.

Aug. 9—Notice of filing petition for review filed by taxpayer with proof of service attached.

Aug. 18—Statement of points and designation of parts of record to be printed with proof of service thereon filed by taxpayer.

Aug. 18—Designation of contents of record on review, proof of service thereon, filed by taxpayer. [2]

* Page numbering appearing at foot of page of original certified Transcript of Record.

The Tax Court of the United States

Docket No. 11427

H. M. HOLLOWAY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols LA:GT:90D:NAB) dated May 9, 1946, and as a basis of this proceeding alleges as follows:

I.

The petitioner is an individual with his principal office at Lost Hills, Kern County, California. His post office address is P. O. Box 310, Lost Hills, California. The gift tax return for the period here involved was filed with the Collector for the Sixth District of California.

II.

The notice of deficiency (copy of which is attached hereto and marked "Exhibit A") was mailed to the petitioner on May 9, 1946.

III.

The taxes in controversy are gift taxes for the calendar year 1944 and in the amount of \$6,421.41.

IV.

The determination of tax set forth in the said

notice of deficiency is based upon the following errors: [3]

a. The Commissioner erred in determining that properties which were the subject of gifts were community properties, none of which had been received as compensation for personal services actually rendered by petitioner's wife or derived originally from such compensation or from the separate property of the wife, and consequently the Commissioner erred in taxing all said gifts to petitioner.

b. The Commissioner erred in determining any gift tax deficiency for the year 1944.

V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

a. At all times material to this proceeding petitioner and his wife, Mary L. Holloway, were living together as husband and wife, residents of the State of California.

b. On August 21, 1944, gifts of common stock of H. M. Holloway, Inc., were made by petitioner and his said wife as follows:

| Donees | Number of Shares | Value |
|----------------|------------------|-------------|
| H. S. Holloway | 333 | \$41,625.00 |
| Marian S. Knox | 333 | 41,625.00 |
| Claude O. Knox | 111 | 13,875.00 |
| | <hr/> | <hr/> |
| Totals | 777 | \$97,125.00 |

c. H. M. Holloway, Inc., was organized on or about August 1, 1944, at which time 800 shares of common stock were issued to and in the name of

H. M. Holloway in exchange for cash and certain properties. Said cash and properties had been acquired through personal services by petitioner and his wife as community income or property over a period of years commencing [4] in or about 1933. Each spouse contributed personal services of equal value in acquiring said cash and properties. Said 800 shares of common stock of H. M. Holloway, Inc., out of which the gifts of 777 shares were made, as hereinabove alleged, constituted community property of petitioner and his wife. One-half of said shares were derived originally from compensation for personal services actually rendered by petitioner's wife or from her separate property.

d. Within the time required by law petitioner and his wife filed separate gift tax returns for the year 1944, on which each reported one-half of the gifts shown above, in the amount of \$48,562.50, and each paid the tax shown to be due thereon in the sum of \$352.03.

e. The Commissioner erroneously and illegally determined that no part of the properties which were the subject of the gifts was economically attributable to petitioner's wife and he therefore determined, erroneously and illegally, that the total gifts in the sum of \$97,125.00 should be taxed to the petitioner, thereby determining the deficiency which is hereby appealed.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that one-half of the properties given were received as compensation for personal services actually rendered

by petitioner's wife or derived originally from such compensation or from separate property of the wife, and determine that there is no deficiency in petitioner's gift tax liability for the calendar year 1944; and grant such [5] other and further relief, including refunds, as to it may seem just and proper in the premises.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Attorneys for Petitioner. [6]

State of California,
County of Kern—ss.

H. M. Holloway, being first duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except the matters which are therein stated to be upon information and belief and that as to those matters he believes it to be true.

H. M. HOLLOWAY.

Subscribed and sworn to before me this 20th day of June, 1946.

(Seal) MAE BUNYARD,
Notary Public in and for said County and State.

My commission expires Oct. 27, 1946. [7]

EXHIBIT A

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

May 9, 1946

Office of Internal Revenue Agent in Charge, Los
Angeles Division, LA:GT:90D:NAB

Mr. H. M. Holloway
P. O. Box 310
Lost Hills, California

Dear Mr. Holloway:

You are advised that the determination of your gift tax liability for the calendar year 1944 discloses a deficiency of \$6,421.41, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf.

The signing and filing of this form will expedite the closing of your return(x) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner,

By GEORGE D. MARTIN,
Internal Revenue Agent in Charge.

Enclosures: Statement, Form of waiver. [8]

LA:GT:90D:NAB

District of Sixth California

Donor: H. M. Holloway

Year: 1944

Statement

| Gift Tax Year | Liability | Assessed | Deficiency |
|---------------|------------|----------|------------|
| 1944 | \$6,773.44 | \$352.03 | \$6,421.41 |

In making this determination of the federal gift tax liability of the above named donor, careful consideration has been given to the report of the examination dated January 24, 1946.

A copy of this letter and statement has been mailed to your representative, Mr. Arthur G. McGregor, 728 Pacific Mutual Building, Los Angeles 14, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Gifts

| | | |
|-------------------------------------|--------------|--------------|
| Schedule A of return: | Returned | Determined |
| Total gifts | \$ 48,562.50 | \$ 97,125.00 |
| Less: Total exclusions..... | 9,000.00 | 9,000.00 |
| | <hr/> | <hr/> |
| Total included amount of gifts..... | \$ 39,562.50 | \$ 88,125.00 |
| Specific exemption | 30,000.00 | 30,000.00 |
| | <hr/> | <hr/> |
| Net gifts for 1944..... | \$ 9,562.50 | \$ 58,125.00 |

Explanation of Adjustments

Schedule A: Totals\$ 48,562.50 \$ 97,125.00

It is determined that all of the properties given were community properties of the donor-husband and his wife, none of it having been received as compensation for personal services [9] actually rendered by the wife or derived originally from such compensation or from the separate property of the wife, and are gifts of the donor-husband.

Computation of Tax

| | | |
|---|------------|--------------|
| | Returned | Determined |
| Net gifts for 1944..... | \$9,562.50 | \$ 58,125.00 |
| Total net gifts for preceding years..... | 0.00 | 0.00 |
| | <hr/> | <hr/> |
| Total net gifts..... | \$9,562.50 | \$ 58,125.00 |
| Tax on total net gifts..... | \$ 352.03 | \$ 6,773.44 |
| Total tax payable, 1944..... | | \$ 6,773.44 |
| Tax assessed: | | |
| Original March 1945 list, page 202, line 1..... | | \$ 352.03 |
| | | <hr/> |
| Deficiency | | \$ 6,421.41 |

[Endorsed]: Filed June 28, 1946. [10]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I, II and III.

Admits the allegations contained in paragraphs I, II and III of the petition.

IV.

Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph IV of the petition.

V.

(a) Admits the allegations contained in subparagraph (a) of Paragraph V of the petition. [11]

(b) and (c) Denies the allegations contained in subparagraphs (b) and (c) of paragraph V of the petition.

(d) Admits the allegations contained in subparagraph (d) of paragraph V of the petition.

(e) Denies the allegations contained in subparagraph (e) of paragraph V of the petition.

VI.

Denies each and every allegation contained in the

petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
E. A. TONJES,
Special Attorneys, Bureau of
Internal Revenue.

[Endorsed]: Filed Aug. 20, 1946. [12]

[Title of Tax Court and Cause.]

MOTION FOR SUBSTITUTION OF PARTY

Whereas, H. M. Holloway, the petitioner above named, died on or about October 4, 1947; and

Whereas, Harvey S. Holloway is the duly appointed, qualified and acting executor of the Estate of said H. M. Holloway, deceased, and is authorized to prosecute the appeal in this proceeding heretofore instituted by said decedent;

Now, therefore, it is respectfully moved that Harvey S. Holloway, as executor of said estate, be substituted in this proceeding as the proper party in the place and stead of H. M. Holloway and that the caption of this proceeding be amended to read as follows:

“The Tax Court of the United States

Docket No. 11,427

H. M. HOLLOWAY, Deceased,

HARVEY S. HOLLOWAY, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.” [13]

Dated: November 28, 1947.

/s/ A. CALDER MACKAY,

/s/ ARTHUR MCGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ ADAM Y. BENNION,

Attorneys for Petitioner.

[Endorsed]: Filed Dec. 2, 1947. [14]

[Title of Tax Court and Cause.]

ORDER AMENDING CAPTION

It appearing of record herein that the petitioner, H. M. Holloway, has died since the filing of the petition, and that Harvey S. Holloway, the duly

qualified and acting executor of the estate of H. M. Holloway, deceased, has been substituted as petitioner, it is

Ordered: That the caption herein be amended to read:

ESTATE OF H. M. HOLLOWAY, Deceased,
HARVEY S. HOLLOWAY, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

/s/ R. L. DISNEY,
Judge.

Dated: Washington, D. C., March 29, 1948. [15]

10 T. C. 110

The Tax Court of the United States

Docket No. 11427

ESTATE OF H. M. HOLLOWAY, Deceased,
HARVEY S. HOLLOWAY, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated May 13, 1948

The decedent, a resident of California, was assisted by his wife in starting a fertilizer business. They started with no capital. She signed notes with

him to borrow money and contributed some services, in the earlier stages. They agreed orally that they would share equally. Later a corporation was formed and the stock was issued in the name of the decedent for assets accumulated by decedent and his wife. A gift of most of the stock was soon thereafter made. Held, on the facts, the gift was not to the extent of one-half made by the wife, one-half of the stock not being received by her as compensation for personal services actually rendered by her, within section 1000(d), of the Internal Revenue Code.

A. Calder Mackay, Esq., and Adam Y. Bennion, Esq., for the petitioner. E. A. Tonjes, Esq., for the respondent. [16]

This proceeding involves a Federal gift tax deficiency in the amount of \$6,421.41 for the year 1944. The only issue is whether any portion of the property transferred to the donees was received as compensation for personal services actually rendered by H. M. Holloway's wife, Mary L. Holloway.

In accordance with a motion announcing the death on or about October 4, 1947, of H. M. Holloway (hereinafter referred to as decedent), the duly appointed executor of his estate, Harvey S. Holloway, was substituted for the decedent as the petitioner herein.

The case was submitted on a stipulation of facts and oral testimony. The facts as stipulated are so found. Such parts thereof as it is considered necessary to set forth are included with other facts found from evidence adduced in our

FINDINGS OF FACT.

At all times material hereto decedent and Mary L. Holloway lived together as husband and wife. In 1932, decedent and his wife were 63 and 56 years of age, respectively. Neither had any substantial property at that time. During the year 1932, decedent obtained a job as watchman for an oil company in Lost Hills, paying \$100 per month. He made his home in a small galvanized iron building on the floor of an oil derrick. Decedent's wife joined him at Lost Hills in February 1933, to care for him after he had fallen and broken some ribs. After she decided to remain there with him, he enlarged the building in which he lived and made it more comfortable. Except for a few days visit in Los Angeles, she remained with him from that time on. He continued his employment as guard at the oil derrick until about 1935. [17]

Some time after moving to Lost Hills, decedent took an interest in outcroppings of gypsum in the vicinity of the oil derrick. The first development he did on this project was on property known as the Theta lease. The first work on the lease was with a pick and shovel and a wheelbarrow. He later borrowed a tractor and a plow from a neighbor and plowed the gypsum so that it could be loaded onto trucks with shovels. He would stay at the gypsum property for hours working in the hot sun. His wife would worry about him and make many trips to see if he was all right. She would also take him his lunch and water to drink.

During the fall of 1934, while still employed as

watchman of the oil property, decedent had opportunity to go to work for an oil company in building a gasoline plant located approximately 10 miles from the oil derrick where he and his wife lived. This employment lasted six or eight weeks. His wife took care of the gypsum interest at that time while he was away, in that she watched the trucks as they would come in, told them where to go to load and where to be weighed; also making a memorandum of names, addresses and truck license numbers of those customers with whom she was not acquainted. Decedent also made frequent trips to the surrounding towns, 60 and 80 miles away, to promote sales of the gypsum, being gone all day and frequently until late at night. His wife would look after the property in a manner similar to that when he was employed in the building of a gasoline plant. In the evenings she would usually go with decedent to get the [18] tickets, and then assist him in computing the poundage and in making up the bills.

Decedent attempted to interest young men in working with him to develop the gypsum property and on several occasions he persuaded some to come there to work with him for their room and board but they stayed with him for only short periods. The decedent's wife boarded and cooked for the men. Occasionally when the demand arose, decedent would hire as extra help on their days off some of the men working at the oil fields. His wife, in 1934 or 1935, suggested that it would be wise for her to return to Los Angeles to secure

employment. He asked her not to do so for no one else would stay there and and help him and that if she would remain, half of anything they made would be hers.

On several occasions it was necessary to borrow a few hundred dollars. The notes were signed by both decedent and his wife. Decedent and his wife had a joint bank account.

Decedent and his wife had accumulated practically nothing up to the year 1937. Some time during that year decedent began operating a larger lease known as the Lang property, which was located about two miles from the oil derrick where he and his wife lived at that time. There was no cost to him of the Lang property other than the payment of a royalty upon extraction of the gypsum. As his activities increased he employed help, so that by 1941 he had a number of employees. About 1939 the daughter of decedent and his wife came to live with them and help decedent, which relieved his wife of considerable of her duties. Decedent's wife went to the site of the Lang property but a few times. [19]

Decedent and his wife built a new house in the vicinity of the oil derrick and moved into it in 1941.

H. M. Holloway, Inc., was organized about August 1, 1944, at which time 800 shares of common stock were issued to and in the name of decedent, in exchange for cash and certain properties, consisting of the equipment being used in the business, about \$41,000 cash, and leases with Security Oil

Company and Richfield Corporation. The assets had been accumulated by decedent and his wife between about 1933 and the date of the incorporation, and particularly from about 1937 onward.

The Lang lease was not assigned to the corporation, which operated it under a mining contract from the decedent.

On or about August 21, 1944, gifts of common stock of H. M. Holloway, Inc., were made as follows:

| Donees | Number of Shares | Value |
|----------------|------------------|-------------|
| H. S. Holloway | 333 | \$41,625.00 |
| Marian S. Knox | 333 | 41,625.00 |
| Claude O. Knox | 111 | 13,875.00 |
| | <hr/> | <hr/> |
| Totals | 777 | \$97,125.00 |

Within the time required by law decedent and Mary L. Holloway filed separate gift tax returns for the year 1944, on which each reported one-half of the gifts shown above, in the amount of \$48,562.50, and each paid the tax shown to be due thereon in the sum of \$352.03. The Commissioner determined that the properties above listed were community properties of decedent and Mary L. Holloway, none of which had been received as compensation for personal services actually rendered by Mary L. Holloway or derived originally from such compensation or from the separate property of Mary L. Holloway. [20]

The gift tax return of decedent for the calendar year 1944 was filed with the collector for the sixth district of California.

OPINION

Disney, Judge: Petitioner and respondent agree that the question in this case is controlled by the application of section 1000(d) of the Internal Revenue Code.¹ The only point on which they disagree is whether any portion of the property, which was subject to the gifts in question, was received as compensation for personal services actually rendered by the wife. The respondent contends that the question is purely one of fact and that the petitioner has the burden of showing to what extent the personal services rendered by his wife contributed to the acquisition of the property in question. The respondent concedes that it is not necessary, in order to come within the meaning of the term "compensation for personal services actually rendered by the wife" that the wife had to render personal services to some third party and to re-

¹Section 1000. Imposition of Tax.

(d) Community Property—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.

Note:—Section 371, Revenue Act of 1948, amends Section 1000(d) by making it applicable only to gifts made after 1942 and before enactment of the Revenue Act of 1948; therefore, the amendment has no effect in this case.

ceive compensation therefor. "It is sufficient if the acquisition of community property under consideration is shown, to some definite extent, to have been economically attributable to the wife's personal services." (Emphasis ours.) [21]

Language similar to that used by respondent is to be found in the Regulations except for the omission of the above emphasized words. We find the following statement concerning the interpretation of the applicable provision of the above-mentioned section 1000(a) of Internal Revenue Code, in Regulations 108, section 86.2(c):

Sec. 86.2 Transfers Reached.

(c) Transfers of community property after 1942.—During the calendar year 1943 and any calendar year thereafter any gift of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country constitutes a gift of the husband for the purpose of the gift tax statute (regardless of whether under the terms of the transfer the husband alone or the wife alone is designated as the donor or whether both are so designated as donors), except to the extent that such property is shown (1) to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation, or (2) to have been derived originally from separate property of the wife. The entire property comprising the gift

is prima facie a gift of the husband, but any portion thereof which is shown to be economically attributable to the wife as prescribed in the preceding sentence constitutes a gift of the wife.

At no place in the Regulations is the term "to some definite extent" used, nor does it appear that such is required by the language of the Code itself. Respondent's position is that the facts presented under the statute and Regulations do not prove petitioner's case. The fact that decedent's wife, in the early days of the development of the gypsum interest, would take him his lunch and drinking water is not showing that any portion of the property here in question is to be economically attributable to her services, for it indicates nothing more than a wife's usual duty. The fact that she took care of the property when decedent was working at the gasoline plant and when he was away developing sales for the gypsum does indicate some contribution of a [22] different nature. The fact that when money was borrowed the notes were signed by both decedent and his wife, indicates a real contribution by her to the development of the business, perhaps commensurate with its size at that time, but obviously it does not comply with the statute nor Regulations, which require that the source of the gift to be traced to personal services actually rendered. Again the fact that decedent and his wife entered into an agreement that half of anything they made would be hers if she would stay at Lost Hills and help him is evidential in a

sense as to her activity, but plainly the statute requires, not contract, but personal services.

No cases cited to us, and none revealed by our search, have covered the question as to what constitutes "personal services actually rendered by the wife" as the term is used in Section 1000(d) of the Internal Revenue Code. On that phrase the Regulation is no help. Upon examination of all of the facts presented by the record, we have found as a fact that decedent's wife at one time contributed some services. Is the gift of stock economically attributable thereto? We do not so consider. The services were performed, in the main, in the earlier years and it appears that there was only a small amount of savings by 1937, when the Lang lease was taken over, and after which she seems to have performed no services. Thus there is a break in the connection between her services and any later business or property. Though there is evidence that the property which was turned into the corporation for stock which was the subject of the gift here involved was accumulated by the decedent and wife after 1933, in the light of the further evidence indicating no services after 1937, we can not say that the property given away in 1944 was economically attributable to her services. [23]

Another difficulty with petitioner's theory here is the fact that the stock donated was issued, in part for leases from Security Oil Company and Richfield Oil Corporation. No showing is made to connect these leases in any way with the wife's personal services. Yet they may have constituted

in large degree the consideration for issuance of the stock. We note too from the evidence that the Lang property, earlier held, was not transferred to the corporation, but that the corporation entered into a mining contract with the decedent, and the corporation operated thereunder. Even if the wife had contributed personal services to the Lang lease—and she “never went there very often. I went a few times”—the lack of connection or economic attribution between the corporate stock donated and her services is plain; and of course it is plainer as to the period prior to the Lang lease and to 1937, by which time such services as she had contributed had resulted in accumulation of “practically nothing.” In the light of the evidence, the statute and the Regulation interpreting it, we hold that decedent’s wife did not contribute such services as to bring her within the meaning of section 1000(d) of the Internal Revenue Code and that one-half of the property transferred to the donees was not received as compensation for personal services actually rendered by her.

Reviewed by the Court.

Decision will be entered for the respondent. [24]

Johnson, J., dissenting: In my opinion the facts found disclose participation by the wife in decedent’s business to a degree which greatly exceeds “a wife’s usual duty” and supports a conclusion that her personal services were a substantial factor contributory to business success and were commensurate with decedent’s efforts in the early years. During those years decedent was employed,

sometimes at a great distance from the gypsum deposits. During his absences the wife managed their private enterprise, and when he was present, she assisted in the details of operation and accounts. Because her services were valuable, decedent dissuaded her from returning to Los Angeles although their condition of life near the deposits was not pleasant. I am unable to agree with the majority view, feeling that her services were of the type which have supported contrary conclusions in *Estate of Frank D. Neumann*, 9 T. C. 1120, and *E. T. 20*, 1947-2C. B. 207.

Leech, J., agrees with this dissent. [25]

The Tax Court of the United States
Washington

Docket No. 11427

ESTATE OF H. M. HOLLOWAY, Deceased,
HARVEY S. HOLLOWAY, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated May 13, 1948, it is ordered and de-

cided: That there is a deficiency in gift tax of \$6,421.41 for the year 1944.

Entered May 13, 1948.

(Seal)

R. L. DISNEY,

Judge.

[26]

[Title of Tax Court and Cause.]

MOTION FOR RECONSIDERATION

Comes now the petitioner above named, by and through its counsel, and respectfully moves that the Findings of Fact and Opinion promulgated by this Honorable Court in the above entitled proceeding on May 13, 1948, be withdrawn and reconsidered. The grounds and argument in support of this motion are set forth in the Memorandum attached hereto and by this reference made a part hereof.

Wherefore, it is prayed that this motion be granted.

Dated June 9, 1948.

/s/ A. CALDER MACKAY,

/s/ ARTHUR MCGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ ADAM Y. BENNION,

Counsel for Petitioner. [27]

[Endorsed]: June 11, 1948.

[Title of Tax Court and Cause.]

**MEMORANDUM IN SUPPORT OF MOTION
FOR RECONSIDERATION**

The Findings of Fact and Opinion in this proceeding, written by Judge Disney and reviewed

by the Court, with Judges Johnson and Leech dissenting, affirmed the Commissioner's determination that the decedent should be taxed upon the entire gift of community property in 1944 by virtue of Section 1000(d) of the Internal Revenue Code, and that no part of the gift was taxable to decedent's wife. The opinion recognizes that this is a case of first impression under the 1942 amendment of the gift tax law insofar as community property is concerned.

1. Petitioner earnestly asserts that the Court fell into error of law when it made the following statement on page 8 of its report:

“* * * Again the fact that decedent and his wife entered into an agreement that half of anything they made would be hers if she would stay at Lost Hills and help him is evidential in a sense as to her activity, but plainly the statute requires, not contract, but personal services.”

If husband and wife agree, for a valuable and adequate consideration in money or money's worth, that they will engage in business as co-adventurers and share the profits equally, we submit that one-half of the profits are economically attributable to each spouse; and it is immaterial whether those profits are held one-half in the name of each spouse, or as [28] joint tenants, or as community property.

This rule was and is universally accepted in respect of joint tenancy property, where it becomes necessary upon the death of a joint tenant to

trace the source of the property. For a long period prior to the community property amendments contained in the Revenue Act of 1942, section 811(e) of the Internal Revenue Code had taxed in the decedent's gross estate all joint tenancy property "except such part thereof as may be shown to have originally belonged to such other person (the surviving joint tenant) and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth".

This Court has consistently held upon facts substantially identical to the facts in the present case that an agreement to share the profits of a business will operate to exclude one-half of the joint tenancy property from the husband's estate under the above quoted provision. See *Estate of Lester L. Fletcher*, 44 B.T.A. 429, and cases cited therein.

Petitioner requests merely the application of the same rule when it comes to tracing the source of community property for estate and gift tax purposes.

The Tax Court has already held that Congress intended the same rule to apply. In *estate of Joseph H. Heidt*, 8 T. C. 969, it was stated at page 974:

"In 1942 Congress adopted the amendment to section 811 of the Internal Revenue Code, section 811(e) (2), designed to eliminate what was believed to be an unequal distribution of the tax burdens of estate taxes and to apply to community property the principles of estate

taxes which had already been applied to other forms of joint ownership on the death of either of the joint owners. See *Fernandez v. Wiener* 326 U. S. 340, 350. * * *” [Emphasis added.]

This holding was obviously correct, for the Ways and Means Committee, in reporting the 1942 amendment dealing with community property, stated that— [29]

“* * * This follows somewhat the treatment which is accorded to joint estates under the existing law. * * *” (House Report No. 2333, 77th Congress, 1st Session, C. B. 1942-2, 402.)

The Supreme Court, in *Fernandez v. Wiener*, 326 U. S. 340, 350, made the same point when it stated:

“Examination of the legislative history of the challenged statute, as disclosed by the Committee Hearings and Reports and the Congressional debates, can leave no doubt that the purpose of Congress in enacting it was the elimination of what was believed to be an unequal distribution of the tax burdens of estate taxes which led Congress to apply to community property the principles of death taxes which it had already applied to other forms of joint ownership, on the death of either of the joint owners. * * *”

True, the language of the 1942 community property amendment is not identical to the language covering joint property, nor, in view of the nature of community property, could it be identical. (For if the amendment had excluded community prop-

erty which “originally belonged” to the wife, the argument would have been made that one-half of all community property “originally belonged” to the wife under State law, and hence the purpose of the amendment would have been defeated.) But the purpose and intent were the same, as we have shown, and the words actually used (“derived originally from such compensation or from separate property of the wife”) are sufficiently broad to cover property acquired under an agreement between the spouses, which agreement was reasonable at the time it was made and was supported by adequate consideration in the form of services rendered theretofore and thereafter, the signing of notes for borrowed funds, and the relinquishment of the wife’s right to secure employment elsewhere.

In advancing the foregoing ground for reconsideration the petitioner is raising no new issue. The argument, with lengthy citation and discussion of the Fletcher and similar cases and reference to the legislative history, was covered in petitioner’s opening and reply briefs. The Court’s opinion [30] in this case would lead one to believe that the parties had presented solely a question of fact. It does not mention the taxpayer’s reliance upon the cognate cases dealing with joint property, it does not cite or attempt to differentiate the Fletcher case, nor does it explain why, in the light of the Congressional history, the same agreement should produce one result as applied to joint property and the opposite result as applied to community property. We respectfully submit that the

Court has committed reversible error of law and has failed to carry into effect the obvious intent of Congress.

Since this is a case of first impression on this point and the case has been reviewed by the full Court, we believe that the taxpayer is entitled in all fairness to have all the Judges cognizant of the principal issue thus presented.

2. The second ground for reconsideration is as follows:

The Tax Court found that money needed in the business was borrowed on the joint credit of decedent and his wife, and stated (page 8) that this “indicates a real contribution by her to the development of the business, perhaps commensurate with its size at that time”. It also found that “decedent’s wife at one time contributed some services”. It also found that in 1934 or 1935 decedent and his wife agreed that “half of anything they made would be hers”. There is nothing in the Findings of Fact or Opinion to indicate that this agreement was other than reasonable and bona fide at the time it was made.

Yet the Tax Court goes on to hold that “there is a break in the connection between her services and any later business or property”.

By this holding the Court in effect overrules its decision in *Estate of Lester L. Fletcher*, 44 B.T.A. 429, 435, where it stated: [31]

“* * * The original contribution of \$1,000 and Mrs. Fletcher’s subsequent services in the store constitute ‘an adequate and full consider-

ation in money or money's worth.' See *Richardson v. Helvering*, *supra*. All subsequent accretions or accumulations related back to the original consideration.' (Emphasis added.)

Similarly, in the present case the agreement applied to all subsequent accumulations in the gypsum business, and consequently the Court erred in holding that there was a "break in the connection" and in going further, on page 9 of the Opinion, to indicate a failure of proof since the leases from Security Oil Company and Richfield Oil Corporation might have constituted "in large degree" the consideration for the stock. The fact is that they did not; but our point is that, whether they did or not, one-half of them was the property of Mrs. Holloway since they "related back to the original consideration".

Dated June 9, 1948.

Respectfully submitted,

/s/ A. CALDER MACKAY,

/s/ ARTHUR MCGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ ADAM Y. BENNION,

Counsel for Petitioner.

[Endorsed]: Filed June 11, 1948. [32]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

The parties above named, by and through their respective counsel, hereby stipulate as follows:

1. At all times material hereto H. M. Holloway and Mary L. Holloway lived together as husband and wife, residents of Lost Hills, Kern County, California. The gift tax return of H. M. Holloway for the calendar year 1944 was filed with the Collector for the 6th District of California. H. M. Holloway died on October 4, 1947, after his petition had been filed herein, and his estate, by its executor, Harvey S. Holloway, has been duly substituted in his stead.

2. On or about August 21, 1944, gifts of common stock of H. M. Holloway, Inc. were made as follows:

| Donees | Number of Shares | Value |
|----------------|------------------|-------------|
| H. S. Holloway | 333 | \$41,625.00 |
| Marian S. Knox | 333 | 41,625.00 |
| Claude O. Knox | 111 | 13,875.00 |
| Totals | 777 | \$97,125.00 |

3. Within the time required by law H. M. Holloway and Mary L. Holloway filed separate gift tax returns for the year 1944, on which each reported one-half of the gifts shown above, in the amount of \$48,562.50, and each paid the tax shown to be due thereon in the sum of \$352.03. The Commissioner determined that the properties above listed were community properties of H. M. Holloway and

Mary L. Holloway, none of which had been received as compensation for personal services actually rendered by Mary L. Holloway or derived originally from such compensation or from the separate property of Mary L. Holloway.

4. H. M. Holloway, Inc., was organized on or about August 1, 1944, at which time 800 shares of common stock were issued to and in the name of H. M. Holloway in exchange for cash and certain properties.

Dated this 2nd day of December, 1947.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Counsel for Petitioner.

CHARLES OLIPHANT,
Chief Counsel Bureau of Internal Revenue, Counsel for Respondent.

[Endorsed]: Filed Dec. 2, 1947. [34]

The Tax Court of the United States

Docket No. 11427

EXECUTOR OF THE ESTATE OF

H. M. HOLLOWAY, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Court Room No. 229,

United States Post Office and Court House Bldg.,
Los Angeles, California.

December 2, 1947—3:05 p.m.

(Met pursuant to notice.)

Before: Honorable Richard L. Disney, Judge.

Appearances: A. Calder Mackay, Adam Y. Bennion, Pacific Mutual Building, Los Angeles, California, appearing for the Petitioner. E. A. Tonjes, (Honorable Charles Oliphant, Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent. [36]

PROCEEDINGS

The Clerk: Docket 11427, H. M. Holloway.

The Court: This is the gift tax case, as I understand it. Make your statement for the Petitioner.

Mr. Bennion: A. Calder Mackay and Adam Y. Bennion for the Petitioner.

Mr. Tonjes: E. A. Tonjes for the Respondent.

Mr. Bennion: We have a similar motion, for the substitution of the estate or I mean the executor for Mr. Holloway.

Mr. Tonjes: No objection.

The Court: The motion will be granted and the estate will be substituted, the executor will be substituted, and the caption amended.

Opening Statement on Behalf of the Petitioner
By Mr. Bennion:

Mr. Bennion: The tax involved here is a gift tax in the calendar year 1944 in the amount of \$6,421.41. On August 21, 1944, seven hundred and seventy-seven shares of stock of H. M. Holloway, Incorporated, were given to H. S. Holloway, Marian S. Knox, Claude O. Knox, who were the son and daughter and son-in-law of Mr. and Mrs. H. M. Holloway. That corporation had been organized about three weeks prior to that time, on August 1st, 1944, and at the date of incorporation certain assets were turned over in exchange for stock, consisting of cash, gypsum mining equipment, [38] and the lease.

This property that was turned over to the corporation was community property, and on gift tax returns, for the calendar year 1944 H. M. Holloway and Mary L. Holloway, his wife, each reported one-half of the gift to these donees. The Commissioner has determined that these shares of stock constitute community property no part of which had been derived originally from the separate property of Mrs. Holloway or from her personal services, and under the 1942 amendment to the gift

tax law, he determined that the entire gift was taxable to Mr. Holloway.

There is no question in this proceeding regarding the value of the gift. The parties have stipulated what was given and their values. The sole issue is whether or not Mrs. Holloway's personal services contributed to the acquisition of these properties that were given to the children, and it will be the purpose of the evidence to show how those properties were acquired and just what contribution was made by Mrs. Holloway.

In that connection a relevant bureau ruling was just issued, came out a day or two ago, E. T. No. 20, which reviews the legislative history of this change in the community property law as far as gift tax is concerned, and rules that the performance of personal services by the wife can qualify as her contribution to community property, and [39] that it need not be personal services performed for other persons for a salary. In other words, the issue is whether or not the property in question is economically attributable to the wife. It is the Petitioner's position here that Mrs. Holloway—that one-half of this property was economically attributable to Mrs. Holloway.

Mr. Mackay: I will call Mr. Holloway, please. I am sorry.

Mr. Tonjes: That is all right.

Opening Statement on Behalf of the Respondent
By Mr. Tonjes:

Mr. Tonjes: My position, your Honor, is that this was not community property and that the evi-

dence will show that whatever services Mrs. Holloway rendered in connection with the parties living in Lost Hills, out at the site of the development of the properties, were those ordinary services that a wife would render to her husband, and that they were not in excess of such services, and therefore under Section 1000 of the Code it should all be regarded as a taxable gift.

The Court: Put on your evidence.

Whereupon,

HARVEY S. HOLLOWAY,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows: [40]

The Clerk: Will you tell us your name, please?

The Witness: Harvey S. Holloway.

Direct Examination

By Mr. Mackay:

Q. Mr. Holloway, are you familiar with the property that was turned in to H. M. Holloway, Incorporated, for its stock in 1944? A. Yes.

Q. What did that property consist of?

A. Well, it consisted of all of the physical properties, that is the equipment that was used in the operation of the business, a matter of some \$41,000.00 cash and leases between the Security Oil Company, with the Security Oil Company and the Richfield Oil Corporation.

Q. That is all the assets? A. Yes.

(Testimony of Harvey S. Holloway.)

Q. Do you know when the \$41,000.00 had been accumulated by your mother and father?

A. Well, to the best of my knowledge and belief, the entire assets were turned over to the corporation were accumulated by my father and mother between the time in 1933, the date my mother went up there, and this.

Q. The date they were transferred?

A. The date they were transferred.

Mr. Mackay: That is all. [41]

Cross Examination

By Mr. Tonjes:

Q. What did you say the nature of the property was?

A. All of the physical assets such as the tractors and the scrapers and the tools and the equipment, scales, office.

Q. Any other property turned over to the corporation?

A. And the cash, and then the leases that my father held with the Security Oil Company and the Richfield Oil Corporation.

Q. Did he turn over any leases he had from one E. Lang? A. No.

Q. He didn't turn that over to the corporation?

A. No.

Q. What was the nature of the leases that he turned over to the company? His Richfield lease and what was the other?

A. The Security Oil Company.

Q. Security Oil Company?

(Testimony of Harvey S. Holloway.)

A. They were gypsum mining leases.

Q. Gypsum mining leases? A. Yes.

Q. During what period did you say that this property was acquired?

A. In the period of time from the time my mother and [42] father—my father and my mother first went to Lost Hills, to the date of the transfer.

Q. When did your father go to Lost Hills?

A. I think I have that ear-marked at 1933.

Q. When did your mother go to Lost Hills?

A. No, I beg your pardon. My father went to Lost Hills in 1932 and my mother went to Lost Hills in February of 1933.

Q. Did your mother ever engage in business?

A. Yes.

Q. What business was she in?

A. That business at Lost Hills.

Q. And who did she work for?

A. She worked with my father.

Q. With your father. Did she act as secretary?

A. Not to my knowledge.

Q. What did she do?

A. She looked after various phases of the business when he was out on the job, if he had other activities that took him away from the mine, my mother remained there and looked after things.

Q. Did she know anything about gypsum?

A. Does she know?

Q. Did she know anything about gypsum when she went up there? [43]

A. I don't know. I doubt it.

(Testimony of Harvey S. Holloway.)

Q. Would you say no?

A. Yes, I will say no.

Q. I don't want to lead you into falsehoods or anything else. We want the facts. Do you know how much time she spent in the gypsum business as distinguished from the wifely duties of cooking --I presume she did the cooking for your father, they lived there alone did they? A. Yes.

Q. Do you know how much time she devoted to the business of selling gypsum?

A. No, not of my personal knowledge.

Q. You have no knowledge of that. The place where they lived was quite a distance from any stores and so forth? A. Yes.

Q. And did your mother usually see that the supplies were brought in, do you know, or who took care of that? I am referring to living supplies and things of that sort. Do you know?

A. No, only in a general way. I don't know positively.

Q. Well, Mr. Holloway, can you tell me anything specifically that your mother did in connection with the conduct of this business and how much time she devoted to it? [44]

A. I am not competent to tell you that, because I was not there at that time.

Q. That is what I mean.

A. Only on occasional trips to visit the folks.

Mr. Tonjes: Yes. I think that is all.

Mr. Mackay: That is all.

The Court: Just a moment, Mr. Witness. Do I

(Testimony of Harvey S. Holloway.)

understand—sit down, Mr. Witness. I want you to help clear up something here. Do I understand that this corporation went into or continued the gypsum mining business?

The Witness: That is right, sir.

The Court: Was there any assignment to this corporation of your father's rights under the Lang lease, or aside from any lease of the right of going ahead and mining gypsum?

The Witness: Your Honor, there were no assignments from my father to the corporation.

The Court: The corporation had nothing then?

The Witness: The corporation—

The Court: Used whose rights?

The Witness: I might explain, the corporation entered into what we call a mining contract.

The Court: With whom?

The Witness: With H. M. Holloway.

The Court: That is what I wanted to know. He made [45] a contract?

The Witness: That is right. We performed the mining operations for my father under that mining contract.

The Court: He assigned nothing to the corporation, merely made a contract with the corporation, is that right?

The Witness: He assigned nothing pertaining to the Lang property.

The Court: That is what I mean. There was nothing by way of assignment from him as to the Lang property?

(Testimony of Harvey S. Holloway.)

The Witness: No, sir.

The Court: But there was a contract between the corporation and your father—

The Witness: Yes.

The Court: As to the operation of that property?

The Witness: Of that property, yes, sir.

The Court: That is what I wanted to know. That is all. Give me some idea, Mr. Holloway, how often you were at the property between 1932 and 1944.

The Witness: Oh, your Honor, I would say that my visits up there were at times maybe twice a year, sometimes three or four times a year.

The Court: How long did you stay when you went up there?

The Witness: Overnight, possibly over the weekend. [46]

The Court: That is all.

(Witness excused.)

Whereupon,

MARY L. HOLLOWAY,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you tell us your name, please?

The Witness: Mary L. Holloway.

Direct Examination

By Mr. Mackay:

Q. Mrs. Holloway, I dislike to ask a women her age, but would you mind telling the Court?

(Testimony of Mary L. Holloway.)

A. I am 71 years of age.

Q. You are 71 years of age? A. Yes, sir.

Q. You are the widow of H. M. Holloway, who has recently died? A. Yes, sir.

Q. And you were married to him, for many years prior to his death?

A. I was married to him in 1896. We were married nearly 51 years.

Q. Do you remember when he went to Lost Hills? A. I remember it very well. [47]

Q. When was that, Mrs. Holloway?

A. July 1st, 1932.

Q. In 1932? A. In 1932, July 1st.

Q. Did he go up there by himself?

A. He went up by himself.

Q. Did he have employment up there?

A. Yes, he was offered employment as watchman on the property immediately adjacent to the gypsum property that we afterward developed. He was employed as a watchman on an oil derrick, on an oil well.

Q. For some time did he live there by himself?

A. For up until the 1st of February of 1933.

Q. And then you joined him?

A. And then I joined him.

Q. Did he have a place to live up there?

A. Well, he had a roof over it and it had four walls.

Q. What was it? A. It was a—

Q. The basement of the derrick of the oil well?

A. No, it was a little galvanized iron building

(Testimony of Mary L. Holloway.)

on the derrick floor, what is commonly known as the dog house.

Q. And he fixed that up, did he?

A. Well, when he went up there it was full of cracks and the wind came through and the dust, and he closed it up [48] and made it possible to inhabit the place.

Q. Did he build himself a bed also up there out of rough lumber?

A. Yes. When he went up there, Mr. Holloway—it was just during the depression and Mr. Holloway was broke.

Q. Didn't have any money?

A. We didn't have any money. We had exhausted our savings during the months of our unemployment and he went up there because he was offered a meal-ticket.

Q. And at that time how old was he?

A. He was 63.

Q. 63? A. 63, I think.

Q. Then you joined him?

A. In February of 1933 I had a letter from him in—soon after the first of January, telling me that he had fallen and broken his ribs, and he had slipped in the mud and had fallen and struck a piece of pipe and broken his ribs. I was very distressed about it and I wrote to him to go to a doctor immediately, which he did and had his ribs taped up. The following Sunday I had my daughter and her son take me up there, and I saw that he needed me and I told him that if he would make

(Testimony of Mary L. Holloway.)

room for me that I would come and stay there with him.

Q. Did he make room for you? [49]

A. He did. He enlarged the place a little and fixed it up a little so that it was more comfortable, built a—put in a built-in bed, and he had secured some gas from the oil hole and had gas lights and was using gasoline for fuel, and he had taken an oil drum and made a heating stove out of it which was very adequate. So I told him that if he could stand it all the time that I could stand it part of the time, and he said, "Well, you can do anything. Anything is possible if you want to do it enough."

Q. So then you—

A. I remained there with him for nine months without leaving.

Q. Without leaving? A. Without leaving.

Q. And then how long were you gone after that nine months?

A. Oh, I went down with my son to Los Angeles for a few days only.

Q. Then you went back?

A. Then I went back.

Q. At the time you went up there in 1933 he was still on the payroll of this oil well company as a guard? A. He was.

Q. Do you remember how long that employment lasted? A. I think until about '35. [50]

Q. Until 1935? A. I think so, about '35.

Q. Was he receiving at that time—was it about a hundred dollars a month?

(Testimony of Mary L. Holloway.)

A. That is right, a hundred dollars a month.

Q. Did you have any money left over at the end of the month after paying for your food, fuel and gasoline?

A. Well, very little.

Q. Most of that hundred dollars a month then was used for living expenses?

A. For living expenses, yes.

Q. Now, do you recall when he first got suspicious that there might be some gypsum up here, in the near vicinity of where you were living?

A. Talked it over with my younger son, who is now deceased, and he told his father about the gypsum being there, and they discussed it and the possibilities of there being something done with it, and my husband saw that there was an opportunity and he decided that he would try to develop the gypsum deposit.

Q. That was on the Theta lease, was it?

A. That was on the Theta lease, yes.

Q. Did your husband try to develop the Theta lease shortly after that?

A. Yes, he did. [51]

Q. How did he develop it?

A. Well, he went out with a pick and shovel and wheelbarrow. He made cuts in the hillside to develop, to find the depth of deposit, and to make an opportunity to build a ramp for loading. His first equipment was a Fordson tractor which he rented from a neighbor of ours, and a plow. He followed the plow and the other man drove the tractor, and they plowed up the gypsum so that it could be loaded with shovels on to the trucks.

(Testimony of Mary L. Holloway.)

Q. And did you sell that gypsum to farmers in the vicinity? A. Yes, we did.

Q. Gypsum is used for fertilizing, isn't it?

A. Yes, soil conditioner.

Q. And the farmers came to this deposit to take their gypsum away?

A. Well, they came and they did their own loading with their shovels a great deal of the time, hand shovels.

Q. Until you got going better?

A. Until we got going where we had other equipment.

Q. And when you got other equipment for it they used that and loaded automatically?

A. Yes, they used a Fresno scraper, what is called a Fresno scraper, at one time, and I think that was borrowed. [52]

Q. Then you continued living in there and helping your husband with the—

The Court: Don't lead your witness.

Mr. Mackay: I beg your pardon.

The Witness: I did.

The Court: Strike the answer.

Mr. Mackay: I will ask you to please—that is my error. Please state what you did.

The Witness: Mr. Holloway—

Mr. Mackay: During the period—let me finish, please.

By Mr. Mackay:

Q. What you did with respect to assisting him during the period say from 1934 to say around the middle or about the middle of 1940?

(Testimony of Mary L. Holloway.)

A. Want to know what I did?

Q. Yes, what you did.

A. When Mr. Holloway was compelled to be away I stayed there and—

Q. Was he away very often?

A. He was away quite often. He was away at one time in the fall of 1934, I think, he had other employment. He had an opportunity to go to work for an oil company in building a gasoline plant and he was employed there for a period of some several weeks, probably six or seven, possibly eight [53] weeks.

Q. Who took care of the property at that time when he was away?

A. Well, I looked after it. I watched the trucks as they would come in, told them where to go and load, told them where to go to be weighed. If I was not acquainted with them I would go up on the hill and get their names and their license numbers and make a memorandum of who they were and where they lived, so that when he came home at night I could give him that information.

Q. Now, after you got going a little better, was it necessary to promote sales?

A. Very necessary.

Q. Who did that?

A. Mr. Holloway did that.

Q. Which would take him away from the property? A. Yes.

Q. Where would he go to do that?

A. Oh, he would go to neighboring outlying towns—Porterville—

(Testimony of Mary L. Holloway.)

Q. About how far would that be from the property?

A. Oh, anywhere from 60 to 80 miles, and at times he went to Fresno, he went to Modesto. He would be gone for possibly a day, until late at night.

Q. When he was gone there rustling sales, who took [54] care of the property and was watching it?

A. I stayed there and watched things and did what I could to take care of the people as they came.

Q. Well, when the people would come there what would you do?

A. I would direct them to the gypsum, and tell them where to get their loads, how to load it, where to go to be weighed. In the evening we would usually go down and gather up the tickets, then we would come back home and I would assist him in computing the poundage and in making up the bills.

Q. And you did that continuously up until—

The Court: Don't lead your witness.

By Mr. Mackay:

Q. How long did you do that?

The Court: I often tell counsel that I will discount evidence just exactly in the same proportion, and logically I am required to discount it just in exactly the same proportion as it is leading, because of course it is not the witness' testimony.

Mr. Mackay: What was that last question?

(The question was read.)

The Witness: Over a period of several years.

By Mr. Mackay:

(Testimony of Mary L. Holloway.)

Q. Did you ever take any outside employment when you [55] were up there?

A. No, I didn't. I thought of doing so. Mr. Holloway had been trying to interest some younger man in helping him develop the property, and on several occasions he persuaded some young man to come there and stay and help him with the work, and we gave them board, I boarded them, cooked for them and gave them their board, we had to furnish them a place to live, we had to pick out a place where they could sleep, and that went on—Oh, it was—I could think of several people who came there to help him for a short period but none of them stayed with him. There was one time when things were going pretty slow and I told him that I thought that it might be a good idea if I would return to Los Angeles and secure employment, and he said, “No, don't do that.” He says, “No one else will stay here and help me, and I want you to do it and we will work it out together, and anything that we make, half of it is yours.” He said, “It will be ours between us.”

Q. Did you regard that as community property?

A. I did regard that as community property, always.

Q. Were there water facilities up near the pit or the property that he was working on?

A. Yes.

Q. So the workers could get a drink right where they were working, could they? [56]

A. We had water piped in to the oil derrick.

(Testimony of Mary L. Holloway.)

Q. To the oil derrick?

A. To the oil derrick.

Q. Was that in the later years?

A. No, that was—Mr. Holloway piped it in himself. It was soon after he went up there.

Q. It was piped into the oil derrick, you say?

A. Yes.

Q. From some spring?

A. No, a pipe-line which was very near.

Q. How far was the dog house from the gypsum property that was being operated?

A. Oh, a quarter of a mile.

Q. Did you go up to these properties very often? What was the occasion for going up?

A. When I would see some trucker driving in I would go up to find out who he was, and I often went up there at night, sometimes I would see someone drive in and I wouldn't know who they were and I would take my flashlight and go up and make a memorandum of the license number and the name and the residence.

Q. Now, did you or Mr. Holloway ever borrow any money to carry on these operations?

A. Each time—we had to borrow a few hundred dollars several times. [57]

Q. Who signed the notes?

A. We both signed them.

Q. You both signed the notes?

A. We both signed the notes.

Mr. Mackay: You may take the witness.

(Testimony of Mary L. Holloway.)

Cross Examination

By Mr. Tonjes:

Q. Mrs. Holloway, you said you first went to Lost Hills from Los Angeles in 1933?

A. Yes, sir.

Q. And you stayed there until 1934 some time, then came down to Los Angeles again for a short period, is that right?

A. About Christmas time, I think, of that year, probably.

Q. During that period was the property known as the Lang property being operated?

A. No. The Lang property was not. We had nothing to do with the Lang property at that time. That came later.

Q. How far was the Lang property located from the dog house? A. About two miles.

Q. These other properties that you speak of, were they large in comparison with the Lang property?

A. You mean the Theta lease or what properties? [58]

Q. I don't know what the name of it was. You and your husband, as I understand it, were operating some gypsum properties up there, and selling gypsum to the farmers? A. Yes.

Q. What name did you give to those properties?

A. The Theta Land Company.

Q. Fada? A. Theta.

Q. How does that compare in size with the Lang properties?

(Testimony of Mary L. Holloway.)

A. It is very small compared with the Lang.

Q. Very small. How long did you operate those properties?

A. Well, I think we must have operated those properties for two years at least.

Q. About two years. So perhaps in the early part of 1936 then you were through with those properties?

A. No, we were still there in 1936.

Q. Did you continue to operate them after that?

A. We were still operating that property in the early part of 1937.

Q. And do you know how much money you had accumulated by that time?

A. We had accumulated practically nothing at that time. [59]

Q. Up to 1937? A. Yes.

Q. And when did you begin operating the Lang properties?

A. I think in—well, I can't answer that exactly. It must have been we had a—oh, in 1937 we commenced on the Lang property, but not as—we had a sub-lease, not from Mr. Lang, from another man.

Q. And now, did you ever employ any people up there to help you with the operation of the Lang lease in those early stages?

A. Yes, we had some employees.

Q. You had some employees almost in the beginning of the operation of the Lang property?

A. Yes.

Q. Where did you live at that time?

A. We still lived at the dog house.

(Testimony of Mary L. Holloway.)

Q. You still lived there? A. Yes.

Q. And how long did you live there?

A. Eight years.

Q. So you must have lived there to 1940, is that right? A. '41.

Q. 1941. How many times did you go over to the Lang properties, we will say in 1937 or '38, when you first [60] started operating it?

A. The Lang property was two miles from our place of abode and I don't recall that I went very often. I went a few times.

Q. You spoke of an occasion when Mr. Holloway went away and took a job in the vicinity?

A. About ten miles away.

Q. About ten miles away. Did he come home nights during that period?

A. Yes, he came home nights.

Q. You said something about some discussion between yourself and Mr. Holloway, about certain properties would be half yours and half his, or words to that effect? A. That is right.

Q. About when was that statement made, if you can recall?

A. I think that that was in probably, in 1935.

Q. In 1935. That was after you had—

A. It might have been in 1934. 1934 or 1935.

Q. Somewhere along 1934 or '35. Did you have in mind that that related to the Theta and the other properties?

A. Whatever property we operated on.

Q. What were you operating at that time, or

(Testimony of Mary L. Holloway.)

what you would operate in the future? What did you have in mind?

A. Yes, we expected to continue and we wanted to [61] build up a business. We expected to continue.

Q. To continue the operation?

A. We were expecting some other leases.

Q. What was your understanding that the interests of the parties would be, if any, in the leases?

A. Mr. Holloway told me that half of anything that he made was mine, "of anything we make, half of it is yours." We had a joint bank account. My signature was just as good on the bank account at all times as his was. It was, I might say that it was his proud boast that his wife was entitled to draw funds as she chose without question, that it was half mine and I was entitled to the use of it.

Q. A very fine compliment to you. You continued to operate the Lang property until 1941, and then you moved over to a—

A. We built a house and it is in the immediate vicinity, and we moved up there in 1941, the 29th day of July, 1941.

Q. 1941? A. Yes.

Q. How far was that house located from the Lang properties? the gypsum properties.

A. Approximately two miles.

Q. Two miles? A. Yes. [62]

Q. And at that time did Mr. Holloway have some employees? A. Oh, yes.

Q. He did?

(Testimony of Mary L. Holloway.)

A. He had a number of employees.

Q. He had a number of employees?

A. Yes.

Q. Did you devote any time to the business at that time?

A. Not so much after that. About 1939 our daughter came to live with us and she proceeded then to help her father and that relieved me of considerable of my duties in that respect.

Q. Do you know when he employed his first outside help, so to speak, what year?

A. I imagine it was in—the first few months he went it alone, except for what help I could give him.

Q. What year was this?

A. That was in 1934. He would go up and work, I would get worried about him and go up to see if he was all right. He would stay up there for hours working out in the hot sun. I would go and take him lunch and water to drink, and see if he was all right, and then I would go back and stay at the house, and the first employees that he had he didn't pay wages to, he gave them their living and— [63]

Q. When was the first time he got someone to work under those circumstances?

A. I think in the summer of probably—the summer or spring of 1935.

Q. Has there been someone helping him, I mean some outside help which has been given to him, since that date? A. Has there been?

(Testimony of Mary L. Holloway.)

Q. Yes, I want to know has he always had some help since 1936? A. Oh, yes.

Q. He had one helper, so to speak, beginning in 1936. When did he get any additional help?

A. Well, I imagine he got at times—he didn't always have help. There were men who were working at the oil fields who were very glad to get extra work and they were working four days a week and their earnings were not sufficient to pay their expenses and to give them the money they needed and when Mr. Holloway needed—if he got in a rush, if he had something that called for extra work, he would employ several of those men on their off days to come and work for him, but it was not a regular employment, it was extra employment.

Mr. Tonjes: I think that is all.

Mr. Mackay: That is all, your Honor.

The Court: Let me ask you a question or two, [64] madam.

The Witness: Yes, sir.

The Court: How soon did you begin to develop the Lang property?

The Witness: In 1937, in the summer of 1937.

The Court: Tell me what you acquired, how that started, what sort of interest you acquired at that time?

The Witness: We had a sub-lease given, that was a lease from Mr. Lang. He was holding a lease from Mr. Lang and he made a lease or made a contract with Mr. Holloway for the development or the mining.

(Testimony of Mary L. Holloway.)

The Court: I must have misunderstood you a while ago. I thought you said when you were first interested in the property that it had nothing to do with Mr. Lang, or words to that effect?

The Witness: No, it didn't in the beginning.

The Court: Did you mean by that a man—

The Witness: He was a customer.

The Court: In the beginning had his rights from Mr. Lang?

The Witness: Yes.

The Court: Or was that before Lang had any rights?

The Witness: Oh, no. We obtained his rights. He was a customer of ours and Mr. Lang contacted him and gave him a lease on their Occidental land, and he in turn came to [65] Mr. Holloway and gave him a lease or a contract to mine the gypsum for him.

The Court: That was in 1937?

The Witness: That was in the spring of 1937 that we secured that.

The Court: Did this contract that your husband get cost anything in the way of money?

The Witness: No.

The Court: What was it, a contract to take out gypsum at so much a ton or something of that kind?

The Witness: For a royalty.

The Court: He didn't have to make a down payment?

The Witness: No, I think the other man did.

(Testimony of Mary L. Holloway.)

Q. Yes, I want to know has he always had some help since 1936? A. Oh, yes.

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The Witness: For a royalty.

The Court: He didn't have to make a down payment?

The Witness: No, I think the other man did.

(Testimony of Mary L. Holloway.)

The other man did, I believe, but Mr. Holloway didn't.

The Court: That started in 1937?

The Witness: Yes, sir.

The Court: Now, that house that you built after you were living in this dog house, was that built near the dog house?

The Witness: Yes, approximately you might say a distance of a city block.

The Court: And that was about two miles from the Lang property?

The Witness: Yes, sir.

The Court: At least the Lang excavation? [66]

The Witness: Yes.

The Court: That is all I wanted to ask.

Redirect Examination

By Mr. Mackay:

Q. When you speak of working on the so-called Lang property in 1937, was that just on the surface outcroppings? A. Largely, yes.

Mr. Mackay: That is all.

Mr. Tonjes: No further questions.

The Witness: In fact I might say entirely. I should have said entirely.

The Court: Your next witness.

Mr. Mackay: That is all, your Honor. We rest.

The Court: The Petitioner rests.

Mr. Tonjes: Respondent rests.

Mr. Mackay: I beg your pardon. I neglected to offer the stipulation of facts. We have stipulated

(Testimony of Mary L. Holloway.)

to the amounts and dates and we would like to file it.

The Court: The announcement of resting is withdrawn and the stipulation of facts as filed will be received in evidence. You are now resting, Mr. Petitioner?

Mr. Mackay: Yes, your Honor.

Mr. Tonjes: The Respondent rests.

The Court: It ought not to take you a great while to brief this. Until January 10, 1948, for simultaneous [67] briefs, to February 1st for replies.

(Whereupon, at 3:50 o'clock p.m., Tuesday, December 2, 1947, the hearing in the above-entitled matter was closed.) [68]

United States Circuit Court of Appeals
For the Ninth Circuit

Tax Court Docket No. 11427

ESTATE OF H. M. HOLLOWAY, Deceased,
HARVEY S. HOLLOWAY, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE
UNITED STATES

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Comes now the Estate of H. M. Holloway, Deceased, Harvey S. Holloway, Executor, and respectfully shows:

I.

NATURE OF THE CONTROVERSY

Respondent determined a deficiency in the gift tax liability of the decedent, H. M. Holloway, for the calendar year 1944 in the amount of \$6,421.41. The decedent filed a petition with The Tax Court; and his estate, subsequently to his death on October 4, 1947, was substituted as petitioner in his stead. The proceeding was heard at Los Angeles, California, on December 2, 1947, by the Honorable Richard L. Disney, Judge of The Tax Court.

The issue presented below was whether the Commissioner erred in determining that the decedent alone should be subject to gift tax [69] upon a gift of community property during the year 1944, or whether, as petitioner contended, the gift should be taxed one-half to the decedent and the other one-half to his spouse.

In 1932 decedent (then 63 years of age) and his wife (then 56 years of age) were penniless. He obtained a job as watchman for an oil company in Lost Hills, California, paying \$100.00 per month. She joined him in February, 1933, and from that time until 1941 they made their home in a small galvanized iron building on the floor of an oil derrick.

While thus employed decedent became interested in outcroppings of gypsum in the vicinity, which he began to work with pick, shovel and wheelbarrow. The gypsum was sold to farmers for use as fertilizer. Decedent built a loading ramp and borrowed a tractor and a plow as operations increased. The farmers would come in their own trucks and load the gypsum themselves. Decedent's employment as watchman for the oil company terminated in 1935. Thereafter he continued his efforts toward building up a gypsum business on leased property, the landowner receiving nothing but a royalty based upon sales of gypsum.

Decedent's wife performed services in the conduct of the business commensurate with decedent's efforts in the early years. Decedent was frequently away from the property, promoting sales of the

gypsum, during which times his wife took complete charge of the property and managed the business. On one occasion in 1934 decedent was away from the property for six or eight weeks, during which time his wife carried on the gypsum business. She at all times assisted in the details of operation and in keeping the books and records and rendering bills. What little capital was required was borrowed on their joint credit.

Decedent recognized that if the business was to become a [70] success, it would be necessary to have the full-time services of someone in addition to himself, and he therefore endeavored to interest young men in working with him to develop the property. On several occasions he persuaded some to work with him in return for room and board, but none would remain permanently. Decedent's wife boarded and cooked for such men. In 1934 or 1935, when they were still struggling along, decedent's wife suggested that she would return to Los Angeles to seek paying employment. Decedent asked her not to go, pointing out that no one else would stay there and help him, and he agreed with her that if she would stay and they made a success of the business together, one-half of the business, of the property acquired and of the income would be hers. She therefore abandoned her plan to return to Los Angeles and worked with him to get the business on its feet.

As the business grew equipment was purchased and it was possible to hire help for cash, which relieved decedent's wife of some of her duties. In August, 1944, the business was incorporated, the

assets (consisting of equipment, cash and certain gypsum leases) being exchanged for 800 shares of the corporation's stock. The corporation was known as H. M. Holloway, Inc. Three weeks later 777 of these 800 shares, having an agreed value of \$97,125.00, were given to the son, daughter and son-in-law of decedent and his wife.

Decedent and his wife filed separate gift tax returns for the year 1944, each reporting one-half of the above gift. The Tax Court, with two Judges dissenting, upheld the Commissioner's determination that the entire gift should be taxed to the decedent alone upon its interpretation of subsection 1000(d) of the Internal Revenue Code, which was added by Section 453 of the Revenue Act of 1942, and which read as follows before [71] its amendment by Section 371 of the Revenue Act of 1948:

“(d) Community Property. — All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.”

The Revenue Act of 1948, Section 371, amended

this subsection to make it applicable “only to gifts made after the calendar year 1942 and on or before the date of the enactment of the Revenue Act of 1948.”

The petitioner is aggrieved by The Tax Court’s Findings of Fact and Opinion and by its Decision, in that no effect is given therein to the rendition by decedent’s wife of personal services commensurate with those of decedent, which contributed substantially to the business success, nor to the agreement, reasonable in the light of the circumstances under which it was made and predicated upon the consideration of such substantial services rendered by the wife in the past and contemplated for the future and refraining from exercising her right to seek remuneration for employment elsewhere, that one-half of the earnings and property of their joint undertaking would belong to each spouse. The Tax Court erred in failing to determine that one-half of the property was economically attributable to decedent’s wife and therefore was taxable to her for gift tax purposes.

II.

COURT IN WHICH REVIEW IS SOUGHT

The United States Circuit Court of Appeals for the Ninth Circuit is the Court in which review of said decision of The Tax Court is sought pursuant to the provisions of Section 1141 of the Internal Revenue Code. [72]

III.

VENUE

The Findings of Fact, Opinion, and Decision of The Tax Court were entered on May 13, 1948. Decedent's gift tax return for the year 1944 was filed with the Collector of Internal Revenue for the Sixth District of California, whose office is located at Los Angeles, California, within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit. Decedent was a resident of the State of California during 1944, for many years prior thereto and thereafter to the date of his death. His estate is in the course of probate in the Superior Court in and for the County of Kern, State of California, and his duly appointed, qualified and acting executor is a resident of the State of California.

The parties hereto have not stipulated that said decision may be reviewed by any Court of Appeals other than the one herein designated.

Wherefore, petitioner prays that the Findings of Fact, Opinion, and Decision of The Tax Court be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing; and that appro-

priate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Dated August 6, 1948.

/s/ A. CALDER MACKAY,
/s/ ARTHUR MCGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,

Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed August 9, 1948. [73]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Charles Oliphant, Chief Counsel, Bureau of
Internal Revenue, Washington, D. C.

You are hereby notified that the petitioner on the 9th day of August, 1948, filed with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the Findings of Fact, Opinion and Decision of The Tax Court of the United States

heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 9th day of August, 1948.

/s/ A. CALDER MACKAY,

/s/ ARTHUR McGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ ADAM Y. BENNION,

Counsel for Petitioner. [74]

Personal service of the foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 9th day of August, 1948.

/s/ CHARLES OLIPHANT,

Chief Counsel Bureau of Internal Revenue, Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed Aug. 9, 1948. [75]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS OF THE RECORD
TO BE PRINTED

Comes now the Estate of H. M. Holloway, Deceased, Harvey S. Holloway, Executor, Petitioner on review herein, by its attorneys, A. Calder Mackay, Arthur McGregor, Howard W. Reynolds and Adam Y. Bennion, and states that the points on which it intends to rely in this case are as follows:

1. The Tax Court erred in holding and deciding that no portion of the gift made in 1944 repre-

sented property that had been received as compensation for personal services actually rendered by decedent's wife or was derived originally from such compensation or from her separate property, within the meaning of section 1000(d) of the Internal Revenue Code.

2. The Tax Court erred in holding and deciding that there was a break in the connection between valuable services rendered by decedent's wife and the property given away in 1944.

3. The Tax Court erred in failing and refusing to hold and decide that decedent and his wife, pursuant to a valid and reasonable contract fully supported by adequate consideration, were engaged in a joint enterprise or adventure in which each performed vital services and what finances were [76] required were secured upon their joint credit, and as a consequence thereof the property and income accumulated in such joint undertaking belonged to the spouses in equal shares, pursuant to their agreement, and one-half thereof was economically attributable to each spouse within the purview of section 1000(d) of the Internal Revenue Code.

4. The Tax Court erred in that its opinion and decision are not supported by but are contrary to its findings of fact and the evidence, in that the findings of fact disclose the rendition of vital services by decedent's wife and her signature on notes to borrow funds for the business, as well as the fact that she had an agreement with the decedent that if she would help in the business and not seek out-

side employment one-half of anything that was made in the business would be hers, whereas the Tax Court in its opinion and decision holds that no part of the property accumulated in the business was economically attributable to the wife.

5. The Tax Court erred in that its opinion and decision are contrary to law.

Petitioner hereby designates the entire record, as certified to the Clerk of the above entitled Court, as necessary to be printed for the consideration of the points set forth above, including this Statement of Points and Designation.

Dated August 16, 1948.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Attorneys for Petitioner.

Personal service of a copy of the foregoing Statement of Points and Designation is hereby acknowledged this 18th day of August, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent. [78]

[Endorsed]: T.C.U.S. Filed Aug. 18, 1948. [77]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

To the Clerk of the Tax Court of the United States:

Comes now the Petitioner on review herein, by its attorneys, A. Calder Mackay, Arthur McGregor, Howard W. Reynolds and Adam Y. Bennion, and hereby designates for inclusion in the record on review in the above entitled proceeding the complete record of all the proceedings and evidence taken before The Tax Court of the United States and all matters required by Rule 75(g) of the Federal Rules of Civil Procedure, including the following:

1. Docket entries of the proceedings before The Tax Court.

2. Pleadings:

(a) Petition, including annexed copy of deficiency notice.

(b) Answer.

(c) Motion for Substitution of Party.

3. Order Amending Caption.

4. Findings of Fact and Opinion, and Dissenting Opinion, promulgated May 13, 1948.

5. Decision entered May 13, 1948. [79]

6. Motion for Reconsideration and Memorandum in Support of said Motion.

7. Stipulation of Facts.

8. Official report of hearing before the Tax Court on December 2, 1947.

9. Petition for review and notice of filing petition for review.

10. Statement of Points and Designation of Parts of the Record to be Printed.

11. This Designation of Contents of Record on Review.

Wherefore, it is requested that copies of the record as above designated be prepared and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the rules of said Court.

Dated August 16, 1948.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ ADAM Y. BENNION,
Attorneys for Petitioner.

ACKNOWLEDGMENT OF SERVICE

Personal service of a copy of the foregoing Designation is hereby acknowledged this 18th day of August, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed Aug. 18, 1948. [80]

[Title of Cause.]

The Tax Court of the United States
Washington

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 80, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 1st day of September, 1948.

(Seal) /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 12033. United States Court of Appeals for the Ninth Circuit. Estate of H. M. Holloway, Deceased, Harvey S. Holloway, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed September 11, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12033

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF H. M. HOLLOWAY, Deceased, HARVEY S. HOLLOWAY, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

A. CALDER MACKAY,
ARTHUR MCGREGOR,
HOWARD W. REYNOLDS,
ADAM Y. BENNION,

728 Pacific Mutual Building, Los Angeles 14, California,
Counsel for Petitioner.

FILED

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No. 12033

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ESTATE OF H. M. HOLLOWAY, Deceased, HARVEY S. HOLLOWAY, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

Opinion Below.

The Findings of Fact and Opinion of the Tax Court [R. 14-25] are reported at 10 T. C. No. 110.

Jurisdiction.

Notice of deficiency was mailed to H. M. Holloway on May 9, 1946 [R. 8-10], proposing a deficiency in gift tax for the calendar year 1944 in the sum of \$6,421.41. The petition to The Tax Court was filed on June 28, 1946 [R. 4-10], pursuant to Section 1012(a) of the Internal Revenue Code. Issue was joined by the filing of the Commissioner's answer on August 20, 1946. [R. 11-12.] H. M. Holloway died on October 4, 1947, and on motion duly made the executor of his estate, Harvey S. Holloway, was substituted as petitioner. [R. 12-14, 33.]

The cause was heard by the Honorable Richard L. Disney, Judge of The Tax Court, on December 2, 1947. [R.

35-61.] The Tax Court's Findings of Fact and Opinion, two judges dissenting, were promulgated May 13, 1948 [R. 14-25]; and on the same date decision was entered sustaining the Commission's determination of said deficiency of \$6,421.41. [R. 25-26.] This petition for review was filed and notice thereof served upon Counsel for Respondent on August 9, 1948. [R. 62-69.]

The gift tax return of H. M. Holloway for the year 1944 was filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles. [R. 4 and 11.] The petition for review was filed pursuant to Section 1142 and jurisdiction of this Court is invoked under Section 1141 of the Internal Revenue Code.

Statute Involved.

Section 1000(d) of the Internal Revenue Code, added by Section 453 of the Revenue Act of 1942, read as follows during the year 1944:

“(d) Community Property.—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.”

Section 371 of the Revenue Act of 1948 abolished the foregoing rule for the future, by adding:

“This subsection shall be applicable only to gifts made after the calendar year 1942 and on or before the date of the enactment of the Revenue Act of 1948.”

Statement of the Case.

On August 21, 1944, H. M. Holloway and his wife, Mary L. Holloway, made a gift to their son and daughter and daughter-in-law of 777 shares of the outstanding 800 shares of stock in H. M. Holloway, Inc., having an agreed value of \$97,125.00. H. M. Holloway and his wife Mary each filed a gift tax return for 1944 reporting one-half of the gift and paying the gift tax shown due thereon. [R. 33.] The Commissioner proposes to tax the entire gift to H. M. Holloway upon the ground, as stated in the notice of deficiency, that—

“* * * all of the properties given were community properties of the donor-husband and his wife, none of it having been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from the separate property of the wife, and are gifts of the donor-husband.” [R. 10.]

Thus, the basic issue is whether, within the meaning of Section 1000(d), above quoted, any part of the property given away was received as compensation for personal services actually rendered by Mary L. Holloway or was derived originally from such compensation or from her separate property.

H. M. Holloway, Inc., the shares of which were the subject of the gift, was incorporated only three weeks prior to the date of gift, to-wit, on August 1, 1944. Its 800 shares of stock were issued to and in the name of H. M. Holloway, in exchange for cash and assets (such as tractors, scrapers, tools, equipment and gypsum mining leases) that had been acquired and accumulated by H. M. Holloway and Mary L. Holloway in the conduct of a

gypsum mining business. [R. 34, 38-39.] The origin and growth of said business were as follows [most of the following facts, based upon undisputed evidence, are found in The Tax Court's findings, R. 16-18]:

H. M. Holloway and Mary L. Holloway were married in 1896. They were residents of Los Angeles, California, in 1932 and were then 63 and 56 years of age, respectively. They were penniless. H. M. Holloway secured a job as watchman for an oil company in Lost Hills, California, paying \$100.00 per month. Mary joined him in February, 1933, and from that time until 1941 they made their home in a small galvanized iron building on the floor of an abandoned oil derrick. [R. 40, 44, 45, 47.]

While thus employed H. M. Holloway became interested in outcroppings of gypsum in the vicinity, which he began to work with pick, shovel and wheelbarrow. The gypsum was sold to farmers for use as fertilizer. H. M. Holloway built a loading ramp and borrowed a tractor and a plow as operations increased. The farmers would come in their own trucks and load the gypsum themselves. H. M. Holloway's employment as watchman for the oil company terminated in 1935. Thereafter he continued his efforts toward building up a gypsum business on leased properties, the landowners receiving nothing but a royalty based upon sales of gypsum. [R. 46-48, 59.]

Mary L. Holloway performed vital services in the conduct of the business. H. M. Holloway was frequently away from the property, promoting sales of the gypsum, during which times Mary took complete charge of the property and managed the business. On one occasion in 1934 he was away from the property for six or eight weeks, during which time Mary carried on the gypsum

business. She at all times assisted in the details of operation and in keeping the books and records and rendering bills. On several occasions it was necessary to borrow a few hundred dollars, and the notes were always signed by both spouses. [R. 49-50, 52.]

H. M. Holloway recognized that if the business was to become a success, it would be necessary to have the full-time services of someone in addition to himself, and he therefore endeavored to interest young men in working with him to develop the property. On several occasions he persuaded some to work with him in return for room and board, but none would remain permanently. Mary L. Holloway boarded and cooked for such men. In 1934 or 1935, when they were still struggling along, Mary suggested that she would return to Los Angeles to seek paying employment. H. M. Holloway asked her not to go, pointing out that no one else would stay there and help him, and he agreed with her that if she would stay and they made a success of the business together, one-half of the business, of the property acquired and of the income would be hers. She therefore abandoned her plan to return to Los Angeles and worked with him to get the business on its feet. [R. 51, 55-56.]

H. M. Holloway and Mary L. Holloway had accumulated practically no money up to the year 1937. Some time during that year operations were begun on a lease known as the Lang property, located about two miles from the oil derrick. There was no cost to this property other than the payment of a royalty upon extraction of the gypsum. As the business grew and the activities increased equipment was purchased and it was possible to hire help for cash, which relieved Mary of some of her duties. By 1941 there were a number of employees in the business. About

1939 the Holloways' daughter came to live with them and her services also relieved Mary of considerable of her duties. Mary went to the site of the Lang property but a few times. [R. 48, 54, 56-58.]

The business, as heretofore stated, was incorporated on August 1, 1944.

While conceding the rendition by Mary L. Holloway of important services in the early years, the existence and apparent reasonableness of the agreement whereby one-half of the business and its income were to be the property of Mary L. Holloway in recognition of her importance to the enterprise, and that all outside capital needed in the business was obtained upon the joint credit of both spouses, The Tax Court nevertheless held that no part of the property given away was attributable to Mary L. Holloway's services or property within the meaning of Section 1000(d), above quoted. In so concluding The Tax Court made the following three pronouncements, each of which the petitioner believes to be erroneous:

1. “* * * The fact that when money was borrowed the notes were signed by both decedent and his wife, indicates a real contribution by her to the development of the business, perhaps commensurate with its size at that time, but obviously it does not comply with the statute nor Regulations, which require that the source of the gift be traced to personal services actually rendered. * * *” [R. 22.]

2. “* * * Again the fact that decedent and his wife entered into an agreement that half of anything they made would be hers if she would stay at Lost Hills and help him is evidential in a sense as to her activity, but plainly the statute requires, not contract, but personal services.” [R. 22-23.]

3. “* * * Upon examination of all of the facts presented by the record, we have found as a fact that decedent’s wife at one time contributed some services. Is the gift of stock economically attributable thereto? We do not so consider. The services were performed, in the main, in the earlier years and it appears that there was only a small amount of savings by 1937, when the Lang lease was taken over, and after which she seems to have performed no services. Thus there is a break in the connection between her services and any later business or property. * * *” [R. 23.]

The dissenting opinion stated [R. 24-25]:

“* * * In my opinion the facts found disclose participation by the wife in decedent’s business to a degree which greatly exceeds ‘a wife’s usual duty’ and supports a conclusion that her personal services were a substantial factor contributory to business success and *were commensurate with decedent’s efforts in the early years*. During those years decedent was employed, sometimes at a great distance from the gypsum deposits. *During his absences the wife managed their private enterprise, and when he was present, she assisted in the details of operation and accounts*. Because her services were valuable, decedent dissuaded her from returning to Los Angeles although their condition of life near the deposits was not pleasant. I am unable to agree with the majority view, feeling that her services were of the type which have supported contrary conclusions in *Estate of Frank D. Neumann*, 9 T. C. 1120, and *E. T. 20*, 1947-2 C. B. 207.” (Emphasis added.)

Specification of Errors.

Petitioner's Statement of Points is set out in the record at pages 69-71, substantially as follows:

1. The Tax Court erred in holding and deciding that no portion of the gift made in 1944 represented property that had been received as compensation for personal services actually rendered by Mary L. Holloway or was derived originally from such compensation or from her separate property, within the meaning of Section 1000(d) of the Internal Revenue Code.

2. The Tax Court erred in holding and deciding that there was a break in the connection between valuable services rendered by Mary L. Holloway and the property given away in 1944.

3. The Tax Court erred in failing and refusing to hold and decide that H. M. Holloway and Mary L. Holloway, pursuant to a valid and reasonable contract fully supported by adequate consideration, were engaged in a joint enterprise or adventure in which each performed vital services and what finances were required were secured upon their joint credit, and as a consequence thereof the property and income accumulated in such joint undertaking belonged to the spouses in equal shares, pursuant to their agreement, and one-half thereof was economically attributable to each spouse within the purview of Section 1000(d) of the Internal Revenue Code.

4. The Tax Court erred in that its opinion and decision are not supported by but are contrary to its findings of

fact and the evidence, in that the findings of fact disclose the rendition of vital services by Mary L. Holloway and her signature on notes to borrow funds for the business, as well as the fact that she had an agreement with H. M. Holloway that if she would help in the business and not seek outside employment one-half of anything that was made in the business would be hers, whereas The Tax Court in its opinion and decision holds that no part of the property accumulated in the business was economically attributable to Mary L. Holloway. In view of the Tax Court's findings and of the evidence, it was incumbent upon the Court to decide that some part of the property was economically attributable to the wife.

5. The Tax Court erred in that its opinion and decision are contrary to law.

Summary of Argument.

The purpose of the 1942 amendment to the Federal gift tax law was to tax the husband upon the entire gift of community property in the usual case where all the community property had been earned by the husband. The exceptions in the amendment were designed to exclude from this treatment, and tax to the wife, any property "economically attributable" to the wife.

The Tax Court found as facts in the present case, based upon uncontradicted evidence, that (1) Mary L. Holloway took care of the gypsum business during H. M. Holloway's "frequent" absences—for weeks at a time or on all day trips and until late at night; (2) Mary L. Holloway boarded and cooked for men whom Mr. Holloway attempted to interest in remaining permanently to establish a profitable business; (3) the small amount of capital required to get the gypsum business started was borrowed upon the joint credit of H. M. and Mary L. Holloway; and (4) when Mary L. Holloway proposed to return to Los Angeles to seek outside employment, she was persuaded to remain in the primitive quarters at Lost Hills to help establish a successful business, with the understanding between Mr. Holloway and Mary L. Holloway that one-half of anything they made in the business would be hers.

Under these circumstances one-half of the community property accumulated in said business and given away in 1944 was derived from personal services actually rendered by Mary L. Holloway. In any event, a very sizeable portion of said gift was economically attributable to Mary L. Holloway; and The Tax Court erred in deciding that no part of the property was attributable to her.

ARGUMENT.

I.

The 1942 Change in Treatment of Community Property for Gift Taxes Purposes.

Prior to enactment of the Revenue Act of 1942 if community property acquired by husband and wife in California subsequent to July 29, 1927, was given away, the gift was deemed to have been made one-half by the husband and one-half by the wife. This rule stemmed from the legal concept that husband and wife were equal owners of such property. See the decision of this Honorable Court in *Bishop v. Commissioner*, 152 F. 2d 389. The same principle governed upon the death of either spouse—only one-half of the community property was taxable in his or her gross estate.

Since both the estate and gift taxes have progressive rates, there were lower taxes on transfers in community property states than on transfers of the same size in common-law states, in the usual cases where all the property of the married couple had been earned by the husband. In an attempt to eliminate this advantage the Revenue Act of 1942 amended the estate tax law to provide in Section 811(e)(2) of the Internal Revenue Code that all community property should be taxed upon the death of husband or wife, "except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse."

A similar amendment was adopted for gift tax purposes, being subsection 1000(d), heretofore quoted, which

presumes that all community property is that of the husband with the same exceptions.

The rule thus adopted for community property was patterned after the rule in effect since 1916 for the estate taxation of joint tenancy property. Upon the death of a joint tenant his estate is taxed upon all joint tenancy property, "except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth * * *."

It will be observed that the wording of the exception in the 1942 community property amendment is not identical with the language covering joint tenancy property. The reason for the difference lies in the nature of community property, for if the amendment had excluded community property which "originally belonged" to the wife, as in the case of joint tenancy property, the argument would have been made that one-half of all community property "originally belonged" to the wife under State law, and hence the purpose of the amendment would have been defeated.

But the purpose and intent were the same, as the Supreme Court recognized in *Fernandez v. Wiener*, 326 U. S. 340, 350:

"Examination of the legislative history of the challenged statute, as disclosed by the Committee Hearings and Reports and the Congressional debates, can leave no doubt that the purpose of Congress in en-

acting it was the elimination of what was believed to be an unequal distribution of the tax burdens of estate taxes which led Congress to apply to community property the principles of death taxes which it had already applied to other forms of joint ownership, on the death of either of the joint owners.

* * *

As heretofore stated, the 1942 amendment was aimed at the ordinary situation where all the community property had been earned by the husband; and the Congressional reports made it clear that there was to be excepted from such treatment, as in the case of joint tenancy property, all community property “economically attributable” to the wife. The Senate Finance Committee stated (Senate Report 1631, 77th Cong., 2nd Session, C. B. 1942-2, 674):

“The amendments thus make due provision for the exclusion from the gross estate of that portion of the community property which is *economically attributable* to the survivor. * * * Property ‘derived originally from’ compensation or from separate property of the surviving spouse includes (1) property acquired in exchange for property received as compensation or in exchange for separate property, (2) community income yielded by such property and property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property. * * *” (Emphasis added.)

A recent Bureau ruling reviews the above legislative history and correctly adopts a liberal view of the expressed Congressional policy:

“In view of the expressed congressional intent, the terms ‘compensation’ and ‘personal services’ appear to have been used in the statute in a comprehensive sense. The former term is not restricted to salary or wages, nor does usage of the latter term contemplate that the personal services of the surviving spouse must have been rendered to a third person. Personal services, within the meaning of the statute, may also be rendered by spouses who are gainfully self-employed, either independently or in a joint enterprise. * * *” (E. T. 20, C. B. 1947-2, 207.)

The 1942 amendment has now become merely interim legislation, for, as heretofore noted, it was repealed prospectively by the Revenue Act of 1948. In recommending a return to the pre-1942 status of community property for gift tax purposes, the Senate Finance Committee stated (Senate Report 1013, 80th Cong., 2nd Session, accompanying the Revenue Bill of 1948):

“Similarly the Revenue Act of 1942 amended the gift tax with respect to community property. All gifts of community property were made taxable to the husband, unless it could be established that the property transferred was economically attributable to the other spouse. Unfortunately, a number of problems have arisen under the 1942 amendments. Most important of these is the fact that geographical equalization has not been realized in a typical situation. *Furthermore, the problem of determining the economic contribution of the surviving spouse to the community has resulted in an extremely difficult problem of ‘tracing.’* * * *” (Emphasis added.)

II.

The Tax Court Erred in Holding and Deciding That There Was a Break in the Connection Between Valuable Services Rendered by Mary L. Holloway and the Property Given Away in 1944.

The difficulty of tracing property referred to in the preceding quotation is absent in the present case. Neither H. M. Holloway nor Mary L. Holloway had any separate property—or, indeed, property of any kind—when they commenced the gypsum mining business during the depth of the depression. [R. 45.] Any capital needed in the business was borrowed upon their joint credit or was derived from earnings of the business. [R. 48, 52.] Both worked hard over a period of many years to get the business started and to make it a success. [R. 48-52.] It was a joint enterprise or adventure, with the express understanding that the business and profits would belong equally to each spouse. This was akin to a partnership agreement, although the Holloways always regarded the property as community property. [R. 51.]

Since The Tax Court recognizes the value of Mary L. Holloway's services, at least in the early years, the basic premise of its decision against the taxpayer appears to center in its statement that there is no connection between such services and the property given away. This statement seems the more shocking because the property given away represented the avails of the very gypsum mining business which Mary L. Holloway had worked so diligently with her husband to establish.

The Tax Court, to support its decision, states twice that Mary L. Holloway ceased to render services in 1937; and since the Holloways had accumulated no property by

that time, it followed that any property acquired thereafter could not be attributable to services rendered by her. [R. 23.] This theory not only has no evidence to support it but is contrary to evidence in the Record and inconsistent with other findings which The Tax Court makes.

The Tax Court's assertion that Mary L. Holloway "seems to have performed no services" after 1937 is made only in the Opinion part of its report. [R. 23.] The Findings of Fact [R. 16-19] may be searched in vain for any finding that she performed no services after 1937. The findings made by The Tax Court contain a statement that the daughter of Mr. and Mrs. Holloway came to live with them about 1939 and her help relieved Mary L. Holloway "of considerable of her duties." [R. 18.] This finding is completely supported by Mrs. Holloway's testimony [R. 57], and plainly implies that at least as late as 1939 Mary L. Holloway was discharging more than "considerable duties" in connection with the gypsum mining business. It is clearly contrary to the statement in the Court's Opinion that no services were rendered by her after 1937. Furthermore, The Tax Court found, upon evidence, that the assets transferred to H. M. Holloway, Inc., had been accumulated by decedent *and his wife*. [R. 19.]

The record is very clear that no "break" between the services rendered by Mary L. Holloway and "any later business or property," to use The Tax Court's phrase, was intended. Counsel for the Commissioner, on cross-examination of Mary L. Holloway, went into considerable detail regarding the intent of her agreement with H. M. Holloway that one-half of anything the business produced would be hers. Counsel brought out the fact that in 1934 or 1935, when this agreement was made, the gypsum busi-

ness was being conducted on the so-called Theta property, and he inquired whether the agreement was concerned only with that property or was intended to cover other properties that might be acquired in the future. The questions and answers in this respect are as follows [R. 55-56]:

“Q. * * * Did you have in mind that that related to the Theta and the other properties? A. Whatever property we operated on.

Q. What were you operating at that time, or what you would operate in the future? What did you have in mind? A. Yes, we expected to continue and we wanted to build up a business. We expected to continue.

Q. To continue the operation? A. We were expecting some other leases.”

The statement in The Tax Court's Opinion that Mrs. Holloway's services ceased in 1937 is apparently traceable to her testimony that the Lang property was about two miles from the oil derrick and that she went there only a few times. [R. 55.] This, however, does not establish that she performed no services in the business, for there were many services to be performed that did not require her to go to the site of the property, particularly in view of the fact that other employees were hired in the business in the early stages of operation on the Lang property. [R. 54.]

Furthermore The Tax Court's finding, that practically nothing had been accumulated up to the year 1937, is not warranted by the record. The question was asked Mary

L. Holloway on cross-examination as to "*how much money*" had been accumulated by 1937, and her reply was that they had accumulated practically nothing up to that time. [R. 54.] The answer should not be removed from its context, as the Court has done, for the question was limited to accumulations of cash and apparently there had been none. But the business was prospering to the extent that they had employees at that time, as we have just stated, and therefore the business was in such condition that the Holloways could afford to hire such help, and cash that had been earned in the business had been reinvested in equipment. [R. 48.]

It is submitted that The Tax Court's conclusion in this respect is manifestly unfair, as well as being unsupported by the evidence. The stock in question represented assets of a going business, built up cumulatively over a period of ten or eleven years. In the early days it required faith and hope and courage and hard work. As in the case of most growing businesses, when development occurred to the point that employees could be afforded they were hired, to assume some of the drudgery theretofore done not only by Mary L. Holloway but by her husband as well. It is nothing but irony to say, as does The Tax Court, that the success which rewards hard work and permits the hiring of employees is the very factor which leads to the conclusion that there is no connection between the foundation laid by the earlier services and the profits thereafter realized. The Tax Court's view is antagonistic to the average success story of American enterprise.

III.

The Tax Court Erred in Failing and Refusing to Hold and Decide That H. M. Holloway and Mary L. Holloway, Pursuant to a Valid and Reasonable Contract Fully Supported by Adequate Consideration, Were Engaged in a Joint Enterprise or Adventure in Which Each Performed Vital Services and What Finances Were Required Were Secured Upon Their Joint Credit, and as a Consequence Thereof the Property and Income Accumulated in Such Joint Undertaking Belonged to the Spouses in Equal Shares, Pursuant to Their Agreement, and One-half Thereof Was Economically Attributable to Each Spouse Within the Purview of Section 1000(d) of the Internal Revenue Code.

We have heretofore noted that the legislation with which we are here concerned was patterned after the joint tenancy provisions of the estate tax law.

The extreme harshness of The Tax Court's decision is illustrated by the fact that a contrary conclusion would have resulted if Mr. and Mrs. Holloway had agreed, under the circumstances of this case, that the business and profits therefrom would be owned by them as equal partners, or as joint tenants, or one-half by each as his or her separate property.

One case directly in point is *Estate of Lester L. Fletcher*, 44 B. T. A. 429, where the wife invested \$1,000.00 in her husband's store and waited on women customers during the 1890's. The spouses orally agreed that she should have a half interest in the business and all property acquired. After 1900 the wife worked in the store only intermittently. An estate of nearly \$500,000.00 had been accumulated by the time the husband died in 1937. The Board

held that the wife's contribution to such joint property, in accordance with the oral agreement, was sufficient to exclude one-half of it from the decedent's gross estate. It declared at page 434:

“* * * Mrs. Fletcher's contribution of \$1,000 and her services were adequate consideration for the agreement that she should have a one-half interest in the business and property. * * *”

Although each case must rest upon its own facts, we submit that the services rendered by Mrs. Holloway, in relation to total services rendered in this gypsum mining business, were more vital and important to its success than those which were held to be adequate consideration for a one-half interest in the business in the *Fletcher* case.

A case relied upon in the *Fletcher* case was *Berkowitz v. Commissioner*, 3 Cir., 108 F. 2d 319, which held that husband and wife may validly agree to share profits of a business to which they both devote their services, and that the wife's ownership of such profits depends only upon the contract and not upon whether a formal partnership was created.

With respect to the question of services rendered, we believe The Tax Court's analysis misses the mark. We do not understand the cases dealing with joint property to require proof of the rendition of services having equal value at all times to the date of death or gift. It is enough that the agreement creating the joint tenancy appears reasonable in light of the circumstances existing at the time the agreement is made. This is clearly illustrated by the *Fletcher* case, where the wife performed some services during the 1890's but worked only intermittently after 1900. Probably the parties there did not foresee that when

the husband died in 1937 they would own between them a half million dollars. But the agreement was reasonable when it was made and it was respected for tax purposes. One-half of all the property was treated as originally belonging to the surviving wife.

Similarly, in the present case the parties doubtless did not anticipate the full extent to which good fortune would smile upon them. They were going through dark and trying times. Both were working hard. It looked impossible to get the business started and on a paying basis. Mrs. Holloway wanted to seek paying employment. Without her help, Mr. Holloway could not have carried on. They agreed that Mrs. Holloway would remain and help put the business over, and that she would own one-half of anything the business produced. Mrs. Holloway had contributed and continued to contribute vital services toward the foundation of the business in those early days. Certainly, no one could say that the understanding arrived at in this manner was unreasonable or that it was not based upon adequate consideration. It was a valid, reasonable agreement and, we submit, should be carried into effect in this tax controversy.

This point was firmly and clearly stated by The Tax Court in a very recent case reviewed by the full Court—*Paul L. Kuzmick*, 11 T. C. No. 40 (September 16, 1948)—in which the wife's services had been substantial in prior years but had diminished or ceased during the taxable years. By reason of that fact the Commissioner attempted to tax to the husband her share of income from the alleged partnership of husband and wife. The Tax Court repudiated such a theory, as follows:

“* * * Under these circumstances the issue depends not on whether or not the wife rendered services

to the partnership but rather on whether or not the purported assignment of a half interest in the contract may properly be regarded as a capital contribution originating with her. * * *

In prior cases a wife's services, no more extensive or vital to business than those here proved were vital to the inventions, have been held sufficient to warrant recognition of an alleged partnership for tax purposes, *Wilson v. Commissioner* (C. C. A., 7th Cir.), 161 Fed. (2d) 661; *Sinne B. Forsythe*, 10 T. C. 417; *Francis A. Parker*, 6 T. C. 974; *Willis B. Anderson*, 6 T. C. 956. And such services rendered in years preceding a formal partnership agreement have been considered relevant as support for the decision reached, *Samuel Goodman*, 6 T. C. 987; *Leo Marks*, 6 T. C. 659; *Felix Zukaitis*, 3 T. C. 814, even although the wife's services thereafter were reduced or negligible. *Singletary v. Commissioner* (C. C. A., 5th Cir.), 155 Fed. (2d) 207. * * * Those services had been an essential factor in development of the inventions with which the agreement was acquired, and in a very real sense the wife's contribution to the partnership's income-producing asset originated with her. * * * (Emphasis added.)

Hence, we respectfully submit that The Tax Court is superficial when it declares that the statute "requires, not contract, but personal services." [R. 23.] The contract merely fixes that which is to be attributed to the respective spouses by virtue of their contribution to the joint enterprise. The statute, as we have seen, was concerned with property "economically attributable" to the wife. It does not unduly strain the meaning of words to say that income is derived from the wife's personal services where it is paid to her pursuant to a reasonable agreement based

upon her rendition of services. This certainly is not one of the “usual” cases contemplated by the statute, where the entire community property has been earned by the husband.

Conclusion.

As stated by The Tax Court, the fundamental issue in this case is whether “any portion of the property transferred to the donees was received as compensation for personal services actually rendered by H. M. Holloway’s wife, Mary L. Holloway,” or is traceable to such compensation or to her separate property. [R. 15.] Petitioner believes the findings of fact made by the Court *require* the conclusion that some portion of such property was economically attributable to Mary L. Holloway. And it is respectfully submitted that the agreement between the parties, reasonable in the light of the circumstances under which it was made and based upon adequate and full consideration, is determinative as between the parties—and should also be determinative for tax purposes—as to the portion so economically attributable to her.

In view of the foregoing the decision of The Tax Court should be reversed.

Respectfully submitted,

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No. 12033

In the United States Court of Appeals
for the Ninth Circuit

ESTATE OF H. M. HOLLOWAY, DECEASED, HARVEY S.
HOLLOWAY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

DEC 11 1948

PAUL P. O'BRIEN,

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 14-25) is reported at 10 T.C. 828.

JURISDICTION

This petition for review involves a deficiency in gift tax in the amount of \$6,421.41 for the year 1944. (R. 62-68.) On May 9, 1946, the Commissioner of Internal Revenue mailed a notice of deficiency to the taxpayer, H. M. Holloway, now deceased. (R. 8-9.) Within ninety days thereafter, namely on June 28, 1946 (R. 1), such taxpayer filed a petition with the Tax Court for the redetermination of that deficiency pursuant to Section 1012 (a) of the Internal Revenue Code (R. 4-7).

Inasmuch as H. M. Holloway died on or about October 4, 1947, the Tax Court ordered, pursuant to a motion for substitution of party, that Harvey S. Holloway, executor of the estate of H. M. Holloway, be substituted as petitioner in this proceeding. (R. 12-14.)

On May 13, 1948, the Tax Court entered its order sustaining the deficiency as determined by the Commissioner. (R. 25-26.) Motion for reconsideration was denied by the Tax Court June 15, 1948. (R. 3, 26-32.) Within three months thereafter, namely, on August 9, 1948 (R. 3), there was filed a petition for review by this Court (R. 62-68), pursuant to the provisions of Sections 1141-1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether, under the provisions of Section 1000 (d) of the Internal Revenue Code, the gift of property here involved must be treated entirely as the gift of the decedent, as the Tax Court held, or whether the decedent's wife had previously received part of the property as compensation for services actually rendered by her and so may be treated as the donor of one-half of such property, as taxpayer contends.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the applicable statute and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court (R. 16-19) are as follows:

In 1932, decedent and his wife were 63 and 56 years of age, respectively, and neither had any substantial property. During that year decedent obtained a job as watchman for an oil company in Lost Hills, paying \$100 per month. He made his home in a small gal-

vanized iron building on the floor of an oil derrick and was joined by his wife there in February, 1933, when she came to care for him after he had fallen and broken some ribs. Except for a few days visit in Los Angeles, she remained with him from that time on and he continued his employment as guard at the oil derrick until about 1935. (R. 16.)

Some time after moving to Lost Hills, decedent took an interest in outcroppings of gypsum in the vicinity of the oil derrick. The first development he did on this project was on property known as the Theta lease. Such work was done with a pick, shovel and a wheelbarrow. He later borrowed a tractor and a plow from a neighbor and plowed the gypsum so that it could be loaded onto trucks with shovels. He would stay at the gypsum property for hours working in the hot sun. His wife, being worried about him, would make many trips to see if he was all right. She would also take him his lunch and water to drink. (R. 16.)

During the fall of 1934, while still employed as watchman of the oil property, decedent had an opportunity to go to work for an oil company in building a gasoline plant located approximately ten miles from the oil derrick where he and his wife lived. This employment lasted six or eight weeks. His wife took care of the gypsum interest at that time while he was away in that she watched the trucks as they would come in, told them where to go to load and where to be weighed, and made a memorandum of names, addresses and truck license numbers of those customers with whom she was not acquainted. (R. 16-17.)

Decedent made frequent trips to the surrounding towns, sixty and eighty miles away, to promote sales of the gypsum and would be gone all day and frequently until late at night. At such times his wife would also look after the property as she had done

before and in the evenings she would usually go with decedent to get the tickets, and then would assist him in computing the poundage and in making up the bills. (R. 17.)

Decedent attempted to interest young men in working with him to develop the gypsum property and on several occasions he persuaded some to come there to work with him for their room and board but they stayed with him for only short periods. The decedent's wife boarded and cooked for the men. Occasionally when the demand arose, decedent would hire as extra help on their days off some of the men working at the oil fields. His wife, in 1934 or 1935, suggested that it would be wise for her to return to Los Angeles to secure employment. He asked her not to do so for no one else would stay there and help him and that if she would remain, half of anything they made would be hers. (R. 17-18.)

On several occasions it was necessary to borrow a few hundred dollars. The notes were signed by both decedent and his wife. Decedent and his wife had a joint bank account but up to 1937 decedent and his wife had accumulated practically nothing. (R. 18.)

Some time during 1937 decedent began operating a larger lease known as the Lang property, which was located about two miles from the oil derrick where he and his wife lived at that time. He paid nothing for the Lang property except a royalty upon extraction of the gypsum. As his activities increased he employed more help, so that by 1941 he had a number of employees. About 1939 the daughter of decedent and his wife came to live with them and help decedent, which relieved his wife of considerable of her duties. Decedent's wife went to the site of the Lang property but a few times. (R. 18.)

Decedent and his wife built a new house in the

vicinity of the oil derrick and moved into it in 1941. (R. 18.)

H. M. Holloway, Inc., was organized about August 1, 1944, at which time eight hundred shares of common stock were issued to decedent in exchange for equipment being used in the business, about \$41,000 cash, and leases with Security Oil Company and Richfield Corporation. The assets had been accumulated by decedent and his wife during the period from 1933 to the date of the incorporation, but particularly from about 1937 onward. The Lang lease was not assigned to the corporation but was operated by the corporation under a mining contract from the decedent. (R. 18-19.)

On or about August 21, 1944, gifts of the common stock of this corporation were made to H. S. Holloway, Marian S. Knox and Claude O. Knox. Within the time required by law, decedent and his wife filed separate gift tax returns for the year 1944, on which each reported one-half of these gifts in the amount of \$48,562.50, and each paid the tax shown to be due thereon in the sum of \$352.03. The Commissioner determined that these properties were community properties of decedent and his wife, Mary L. Holloway, and that none of these had been received as compensation for personal services actually rendered by Mary L. Holloway or derived originally from such compensation or from the separate property of Mary L. Holloway. (R. 19.)

The Tax Court held that the entire amount of the gifts was taxable to the decedent. Accordingly it decided that there is a deficiency in gift tax of \$6,421.41 for 1944.

SUMMARY OF ARGUMENT

The Commissioner determined that gifts of corporate stock, which were held as community property and which were made by the decedent and his wife in 1944 should be treated, under Section 1000 (d) of the Internal Revenue Code, entirely as gifts of the husband and the Tax Court correctly approved the Commissioner's determination. That section provides a method for taxing gifts of community property, and holds that all gifts of such property shall be considered gifts made by the husband except that gifts of such property as may be shown to have been received by the wife as compensation for services actually rendered by her, or to have been derived originally from such compensation or to be from her separate property, shall be considered to be gifts of the wife. This statutory provision is clear and unambiguous and places the burden of proof on the taxpayer here.

Thus the question presented to the Tax Court was one of fact and the evidence fails to sustain the taxpayer's burden. While there is some evidence that the decedent's wife rendered slight services in the early years of the project involved here, she admitted that during such period they had accumulated nothing. Moreover, the evidence also indicates that it was only after her services ceased and after the decedent began operating in a larger way under a new lease that cash and other property was acquired. It was such cash and property that was turned in by the decedent in exchange for the corporate shares which were soon after given to his two children and son-in-law.

There is also a failure of proof as to the value of the services which were rendered by the wife. Thus, even if such services could be recognized here, and we do not concede that they can, it is not possible to say what part of the gift property could be treated

as coming from her, but such determination is necessary in order to relieve a husband from paying tax on the entire gift of community property.

ARGUMENT

The Tax Court Correctly Held that the Estate of the Deceased Donor was Liable for all of the Gift Tax Due on Account of the Gifts of Community Property Involved Herein

As the Tax Court pointed out (R. 20), it is conceded by the parties that the question here is controlled by Section 1000 (d) of the Internal Revenue Code (Appendix, *infra*). The provisions of that section were enacted in 1942. (See Section 453 of the Revenue Act of 1942, c. 619, 56 Stat. 798.) Prior to that time, the gift tax law contained no provision as to the manner in which gifts of community property were to be taxed. Because of this absence of legislative directives, gifts of community property were then considered as being one-half from the husband and the other half from the wife. But this was changed by the enactment of Section 1000 (d), which prescribes, for the first time, a method for taxing gifts of community property. This method was in force during 1944 when the gifts here were made¹ and the validity of such statutory provision has been upheld. *Beavers v. Commissioner*, 165 F. 2d 208 (C.C.A. 5th), certiorari denied, 334 U. S. 811; *Francis v. Commissioner*, 8 T.C. 822.

Under the method provided in Section 1000 (d), all

¹ While the above section was unquestionably in force during 1944 when the gifts here were made, it was amended by Section 371 of the Revenue Act of 1948, Public Law 471, 80th Cong., 2d Sess., and does not apply to gifts made after the enactment of that Act (i.e., after April 2, 1948).

gifts of community property are to be considered as gifts of the husband except—

that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.

The language of the above provision is so clear there can be no question as to its meaning and no need for interpretation. Thus it is evident that in order to divide a gift tax on community property between a husband and a wife, they must actually have made a gift of some property which was “economically attributable” to her. Section 86.2(c), Treasury Regulations 108 (Appendix, *infra*). And where, as in this case, the wife has no separate property of her own, the property which is given away must have come to her as compensation for personal services actually rendered or it must have been derived originally from such compensation. Consequently, to establish his contention here, the taxpayer must show that Mrs. Holloway actually comes within one of these exceptions. This means that the taxpayer had the burden of proof and that the primary question presented to the Tax Court was one of fact.

The Tax Court reached the conclusion that the gifts of property here (i.e., stock of H. M. Holloway, Inc.) were not economically attributable to the wife and accordingly held that her husband’s estate was liable for the entire tax. The Tax Court’s decision is amply supported by the evidence.

The taxpayer called only two witnesses. The first was the son of Mrs. Holloway. He testified at first that his mother “looked after various phases of the business” when his father was “out on the job” (R.

40), but on further questioning he admitted that he made infrequent visits to his parents and had no personal knowledge of his mother's actual services. This is also shown in the following testimony (R. 41):

Q. Do you know how much time she [Mrs. Holloway] devoted to the business of selling gypsum?

A. No, not of my personal knowledge.

* * * * *

Q. Well, Mr. Holloway, can you tell me anything specifically that your mother did in connection with the conduct of this business and how much time she devoted to it?

A. I am not competent to tell you that, because I was not there at that time.

Consequently the son's testimony establishes nothing as to the so-called services of his mother, and her testimony, while in more detail, also fails to furnish evidence sufficient to meet the burden here. (R. 43-61.) In the early days of the project here (i.e., during 1934), Mrs. Holloway took lunches and drinking water to her husband where he was working on the Theta lease, nearby their dwelling. (R. 48, 57.) But, as the Tax Court held (R. 22), such services indicate nothing more than a wife's usual duty and does not show that any portion of the property later given away was economically attributable to her.

Other services which Mrs. Holloway claims to have rendered also began in 1934 when her husband was away for about six or seven weeks in the Fall working for an oil company. Prior to that time her husband had been digging out gypsum with a pick and shovel from a hillside on the Theta lease (R. 47) and was selling it to farmers who would come for the gypsum and would do their own loading (R. 48). While her husband was away, Mrs. Holloway looked

after the property. She described her services at that time as follows (R. 49):

A. Well, I looked after it. I watched the trucks as they would come in, told them where to go and load, told them where to go to be weighed. If I was not acquainted with them I would go up on the hill and get their names and their license numbers and make a memorandum of who they were and where they lived, so that when he came home at night I could give him that information.

Also, a little later on when her husband went away now and then for a day to make sales, Mrs. Holloway stayed at home and "watched things" and took "care of the people as they came". She also assisted her husband some in the evenings "in computing the poundage and in making up the bills". (R. 50.) However, while this indicates, as the Tax Court found, that at one time the wife contributed some services, it also found that these services were performed mostly in the earlier years, that there was only a small amount of savings by 1937 when the Lang lease was taken over, and that property given away here was the result of accumulations in later years. (R. 23.) Thus it concluded that the stock which was given away was not compensation for the wife's services nor derived from such compensation. Since counsel for the taxpayer questions (Br. 15-18) the Tax Court's findings of fact and conclusion, we call particular attention to other testimony, not only as to the nature of her services and when they were rendered, but also as to how and when the gift property here must have been acquired.

When the taxpayer's husband went to Lost Hills (where the gypsum was found) in 1932, he and his wife had exhausted their savings and had no money. (R. 45.) His job at the oil derrick, which he kept for about three years, paid him a hundred dollars a month,

but most all of that was used for living expenses. (R. 47.) The first gypsum lease was the Theta lease and the property it covered was "very small" in comparison with the property covered by the Lang lease, acquired in 1937. In answer to the question as to how much money they had accumulated by the time the Lang lease was acquired, Mrs. Holloway replied that they "had accumulated practically nothing at that time". (R. 54.) This statement is important for, as the Tax Court found, it was during this period that she rendered practically all of her services yet they had practically nothing to show for their work afterward. In spite of this testimony, counsel for the taxpayer assumes that the gypsum business had been prosperous before acquisition of the Lang lease. He also asserts (Br. 18) that the cash that had been previously earned had been invested in equipment, but such statement is unsupported by any evidence.

Mrs. Holloway's son testified that the property turned in for the corporate stock in 1944 included certain equipment used in the operation of the business (R. 38) but neither he nor anyone else told when or how such equipment was secured. However, Mrs. Holloway testified that at first her husband used only a pick and shovel and wheelbarrow; then he used a plow and a Fordson tractor which he rented from a neighbor. (R. 47.) She also explained that at first the farmers did their own loading "with their shovels" and later when "we got going where we had other equipment" her husband used a Fresno scraper which she thought "was borrowed". (R. 48.) Thus there is nothing to show that any sums of money had been invested in equipment by 1937 or in any other assets.

The Lang lease was acquired in 1937, and was of course a valuable asset, but nothing was paid by the decedent for it in advance as it was given to him on

after the property. She described her services at that time as follows (R. 49):

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The Lang lease was acquired in 1937, and was of course a valuable asset, but nothing was paid by the decedent for it in advance as it was given to him on

the promise of future royalties. (R. 59.) It is evident that the acquisition of this lease marked the turning point in the gypsum development. Up to that time, the decedent, with occasional help from oil men and others, had been digging gypsum from a small piece of land near his home under what was known as the Theta lease, but he had gotten little for his very hard work except experience. It appears that he quit operating under the Theta lease about the time he started operations on a larger scale on the property acquired under the Lang lease in 1937 and he then secured more employees. However, as the latter property was two miles from his home, his wife does not appear to have helped him thereafter. At least, she admitted that she went to the Lang property only a few times. (R. 55-56.) She also testified that in 1939 their daughter, who had come to live with them, helped her father and so relieved her of considerable duties in that respect. (R. 57.)

We submit that it is apparent that during the early years when the wife here was rendering some small services to her husband, they had accumulated no cash or other assets which could be treated as compensation for her services; and it is equally clear that during the period from 1937 to 1944, when cash and other property were acquired, the evidence failed to show that she actually rendered any services. Yet in an attempt to show that Mrs. Holloway was still participating in the business after 1937, counsel for the taxpayer has stated (Br. 17) that there were many services to be performed that did not require her to go to the site of the Lang property, which was two miles from her home. But neither counsel nor the record shows what those "many services" were. However, as we have indicated, it appears from the testimony that operations under the Theta lease (which was near her home) closed about the time operations

began under the Lang lease and that thereafter the customers would not be coming to Mrs. Holloway's house, and the increased number of employees obviously made it no longer necessary for her to help in looking after such customers.

Certainly, in view of this change in the business around 1937, the Tax Court was justified in finding that there was a break in the connection between Mrs. Holloway's services and any later property which was acquired. (R. 23.) But in contending otherwise, taxpayer's counsel points to the finding of the Tax Court that the assets which were exchanged in 1944 for corporate stock were "accumulated by decedent and his wife between about 1933 and the date of the incorporation, and particularly from about 1937 onward". (R. 19.) Of course, it is correct in one sense to say that both husband and wife had accumulated the community property here for, under the law of California, they were equal owners of such property for some purposes. Cf. *Bishop v. Commissioner*, 152 F. 2d 389 (C.C.A. 9th). However, that does not mean, and the Tax Court did not intend it to mean, that the wife here actually received part of the gift property as compensation within the meaning of Section 1000 (d), involved here. To reach the latter conclusion, there must be evidence showing that she actually rendered services and that the accumulated property was received by her as compensation for such services, or was derived from such compensation. But, as the Tax Court explained in its opinion (R. 23), while there is some evidence that the property here was accumulated in the latter sense by both husband and wife, there is also evidence showing that the gift property was really accumulated after 1937 and that Mrs. Holloway performed no services after that year. Thus the Tax Court, after considering all the evidence, including that which may seem conflicting, concluded

that no part of the property which was given away in 1944 was economically attributable to Mrs. Holloway's services.

In this connection, the Tax Court called attention to the fact that when the exchange was made in 1944, prior to the gift, there were two leases from oil companies which were given in exchange for the corporate stock along with cash and operating equipment, and that there was no evidence to connect such leases in any way with the services of Mrs. Holloway. Thus, while these leases undoubtedly are valuable assets, there is no evidence to show when they were acquired or what their cost was. Obviously, it is possible that they were acquired by the decedent without cost, as was the Lang lease, and yet could have a high trade-in value. This failure in proof indicates clearly that, even if we could assume that Mrs. Holloway rendered valuable services and that some part of the gift property is attributable to such services as compensation, we still would not know how much those services were worth or how much of the property which was turned over for the corporate stock could be traced to her efforts. However, such determination is necessary in order to meet the requirements of Section 1000 (d).

In attempting to show how Mrs. Holloway helped her husband, counsel for taxpayer also refers (Br. 15) to the fact that when money was borrowed for the business here, she signed the notes along with her husband. Of course this is a customary practice where property is owned jointly or as community property and doubtless did enable the husband to secure needed capital but, as the Tax Court pointed out (R. 22), such cooperation on Mrs. Holloway's part does not bring this case within the statutory provision which refers to personal services and requires that the gift property be traced to those services. It is also not material that the decedent and his wife may have had

an oral agreement that they would share everything equally. (R. 51.) We are not concerned here with the law of contracts but with a particular statutory provision that taxes gifts of community property as if they were entirely made by the husband unless he can show that his wife has received some part of the property, which is the subject of the gifts, as *compensation for personal services actually rendered* by her or that such property is derived originally from such compensation. This being the nature of the statute, it obviously cannot matter here what agreement the parties had or whether they had any agreement. The important thing is whether Mrs. Holloway actually rendered services and, if so, how much of the property which was given away is directly or indirectly traceable to the compensation she received for such services.

The Tax Court found that she rendered no material services in the years when the gift property was acquired and its findings and conclusion based thereon are amply supported by the evidence. Thus it cannot be said that its decision is clearly erroneous or not in accord with the evidence.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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Attorney General.*

NOVEMBER, 1948.

APPENDIX

Internal Revenue Code:

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. Gift taxes for the calendar years 1932-1939, inclusive, shall not be affected by the provisions of this chapter, but shall remain subject to the applicable provisions of the Revenue Act of 1932, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1932.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

(c) [as added by Sec. 452 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Powers of Appointment*.—An exercise or release of a power of appointment shall be deemed a transfer of property by the individual possessing such power. For the purposes of this subsection the term “power of appointment” means any power to appoint exercisable by an individual either alone or in conjunction with any person, except—

(1) a power to appoint within a class which does not include any others than the spouse of such individual, spouse of the creator of the power, descendants of such individual or his spouse, descendants (other than such individual) of the creator of the power or his spouse, spouses of such descendants, donees described in section 1004 (a) (2), and donees described in section 1004 (b). As used in this paragraph,

the term “descendant” includes adopted and illegitimate descendants, and the term “spouse” includes former spouse; and

(2) a power to appoint within a restricted class if such individual did not receive any beneficial interest, vested or contingent, in the property from the creator of the power or thereafter acquire any such interest, and if the power is not exercisable to any extent for the benefit of such individual, his estate, his creditors, or the creditors of his estate.

If a power to appoint is exercised by creating another power to appoint, such first power shall not be considered excepted under paragraph (1) or (2) from the definition of power of appointment to the extent of the value of the property subject to such second power to appoint. For the purposes of the preceding sentence the value of the property subject to such second power to appoint shall be its value unreduced by any precedent or subsequent interest not subject to such power to appoint.

(d) [as added by Sec. 453 of the Revenue Act of 1942, *supra*] *Community Property*.—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1000.)

Treasury Regulations 108, promulgated under the Internal Revenue Code:

Sec. 86.2 *Transfers Reached.*—

* * * *

(c) *Transfers of community property after 1942.*—During the calendar year 1943 and any calendar year thereafter any gift of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country constitutes a gift of the husband for the purpose of the gift tax statute (regardless of whether under the terms of the transfer the husband alone or the wife alone is designated as the donor or whether both are so designated as donors), except to the extent that such property is shown (1) to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation, or (2) to have been derived originally from separate property of the wife. The entire property comprising the gift is prima facie a gift of the husband, but any portion thereof which is shown to be economically attributable to the wife as prescribed in the preceding sentence constitutes a gift of the wife.

No. 12034

United States
Court of Appeals
for the Ninth Circuit

PACIFIC COAST MARINE FIREMEN, OIL-
ERS, WATERTENDERS AND WIPERS AS-
SOCIATION, an unincorporated association,
Appellant,

vs.

COASTWISE (PACIFIC FAR EAST) LINE, a
corporation,
Appellee.

Transcript of Record

Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

NOV 1 - 1948

PAUL P. O'BRIEN



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Northern District of California,
Southern Division

No. 27920-G

COASTWISE (PACIFIC FAR EAST) LINE, a
corporation,

Plaintiff,

vs.

PACIFIC COAST MARINE FIREMEN, OIL-
ERS, WATERTENDERS AND WIPERS
ASSOCIATION, an unincorporated associa-
tion,

Defendant.

ACTION FOR DAMAGES FOR BREACH OF
CONTRACT UNDER THE LABOR MAN-
AGEMENT RELATIONS ACT OF 1947

Coastwise (Pacific Far East) Line, plaintiff
herein, for cause of action against Pacific Coast
Marine Firemen, Oilers, Watertenders and Wipers
Association, an unincorporated association, defen-
dant herein, alleges:

I.

This action arises under the Labor Management
Relations Act of 1947, Chapter 120, Public Law
101, Title III, Section 301, hereinafter referred
to as the "Act", and this court has jurisdiction
over this cause of action pursuant to said Act.

II.

Plaintiff, Coastwise (Pacific Far East) Line, a
corporation, was at all times herein mentioned,

and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon. Plaintiff is, and at all times herein mentioned, has been the operator of the vessel SS Joel Chandler Harris.

III.

Defendant is now and at all times mentioned has been an [1 *] unincorporated association composed of employees performing work in the Engine Room Department of vessels, including those operated by plaintiff, sailing out of Pacific Coast ports of the United States to other American ports and ports of foreign countries upon the high seas and upon the navigable waters of the United States. Defendant is and at all times herein mentioned has been a labor union or labor organization with its principal office and place of business in the City and County of San Francisco, Northern District of California, and is now and at all times herein mentioned has been engaged in its business and activities as a labor union or organization in the City and County of San Francisco, Northern District of California.

IV.

Defendant is hereinafter sometimes referred to as the "Union". Defendant at all times herein mentioned represented employees of plaintiff in the Engine Room Department of the SS Joel Chandler Harris as a labor organization and collective bar-

* Page numbering appearing at foot of page of original certified Transcript of Record.

gaining agent in accordance with the provisions of the agreement hereinafter set forth.

V.

On or about December 7, 1944, plaintiff and defendant made and entered a certain contract providing for, among other things, the wages, hours and working conditions, and other conditions of employment of employees employed by plaintiff in the Engine Room Department of vessels operated by plaintiff including the SS Joel Chandler Harris. Said contract is one of Maritime service, and was entered into between plaintiff as employer and defendant as a labor organization representing employees of plaintiff in the shipping industry, an industry affecting commerce as defined in the Act. A true and correct copy of said contract is attached hereto as Exhibit A and made a part hereof by reference. Said contract and the provisions thereof were in full force and effect at all times mentioned.

VI.

In and by said contract plaintiff agrees, among other things, to give preference of employment to members of defendant, and defendant agrees to "furnish unlicensed Engine Room personnel as required by the companies, [2] parties to this agreement", including plaintiff which is one of the companies parties to said contract. Said contract further provides that "There shall be no strikes or stoppages of work as long as the covenants of this agreement are performed."

VII.

On or about February 16, 1948, the SS Joel Chandler Harris was lying in the navigable waters of the United States in the Port of San Pedro, California, and was in the process of discharging its cargo. At said time and place defendant instructed and ordered the employees of plaintiff in the Engine Room Department of the SS Joel Chandler Harris, said employees being members of defendant, to refuse to work and service the engines of said SS Joel Chandler Harris and to refuse to furnish steam for the discharging of the cargo of the SS Joel Chandler Harris. At or about 10:30 a.m. and thereafter on said February 16, 1948, the said employees of the said Engine Room Department of the SS Joel Chandler Harris, pursuant to the instructions of defendant, refused to work the said engines of the SS Joel Chandler Harris and to furnish steam for the discharging of the cargo of said vessel. From 10:30 a.m. on said February 16, 1948, to and including the present time, defendant and its members have refused to work the engines of the SS Joel Chandler Harris and to furnish steam for the discharging of cargo of said vessel. Defendant then and there in violation of its said contract engaged in a strike and stoppage of work against plaintiff by so instructing its members, the said employees of the Engine Room Department of the vessel, to refuse to work said engines and to furnish steam for the discharging of cargo. As a result thereof plaintiff has been unable to discharge the cargo of said

vessel and said vessel has been delayed and plaintiff has suffered damages as a result thereof as will be more particularly hereinafter alleged.

VIII.

On February 16, 1948, and at all times from said date to and including the present time, plaintiff demanded of defendant that defendant, pursuant to its contract with plaintiff, furnish Engine Room employees and personnel to man said vessel, but during all of said time defendant [3] engaged in a strike and stoppage of work as aforesaid and violation of its said contract by instructing its members not to man said vessel and to furnish steam as aforesaid, and by refusing and failing to furnish Engine Room employees and personnel for said vessel.

IX.

At the time of filing of this action the said vessel is still at the Port of San Pedro, California, and defendant, contrary to its contract with plaintiff, is still engaged in a strike and stoppage of work by refusing to man said vessel and to furnish steam for the discharge of cargo and by refusing to furnish personnel and employees for the Engine Room Department of said vessel.

X.

As a direct and proximate result of said strike and stoppage of work by defendant, and the refusal and failure of defendant to furnish personnel and employees for the Engine Room Department of said vessel, plaintiff has been damaged to date in the sum and amount of \$4,774.00.

XI.

At the time this action is filed the violations of said contract by defendant as aforesaid are continuing, and plaintiff is unable to allege with particularity at this time how long said violations will continue and the amount of damages which will result from said continued violations. Plaintiff alleges that for each additional day the said vessel is delayed by defendant as aforesaid, plaintiff will suffer damages in the approximate sum of \$1,600.00 per day and plaintiff prays leave to amend this complaint at the appropriate time when said damages are definitely ascertained.

XII.

Plaintiff has at all times performed all conditions precedent provided or required by the contract herein referred to and has performed each and all of its obligations under said contract.

Wherefore, plaintiff prays judgment against defendant in the total sum of \$4,774.00, together with interest thereon at the legal rate from [4] date thereof to date of payment and for judgment in the amount of \$1,600.00 per day for each day the said vessel is delayed from and after February 19, 1948, and for costs of this action.

BROBECK, PHLEGER &
HARRISON,
MARION B. PLANT,
ROBERT E. BURNS,
Attorneys for Plaintiff.

EXHIBIT "A"

AGREEMENT COASTWISE TRADE

This agreement, entered into this Seventh day of December, 1944, and amended July 16, 1946, by the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association, Party of the First Part, hereinafter known as the Union; and the Pacific American Shipowners Association on behalf of its members here listed:

Baxter & Co., J. H.
 Burns Steamship Co.
 Chamberlin & Co., W. R.
 Coastal Steamship Co.
 Coastwise Line
 Coastwise (Pacific Far East) Line
 Coastwise Steamship & Barge Co., Inc.
 Consolidated-Olympic Line
 Dorothy Philips Steamship Co.
 Freeman & Co., S. S.
 Griffiths & Sons, James
 Griffiths Steamship Co.
 Hammond Lumber Company
 Hammond Shipping Co., Ltd.
 Kingsley Company of California
 Olson & Co., Oliver J.
 Pope & Talbot, Inc. (McCormick Steamship
 Co. Division)
 Ramelius, Capt. J.
 Schafer Bros. Steamship Lines
 Sudden & Christenson [5]
 Wheeler-Hallock Co.

West Coast Steamship Co.

Wood Lumber Co., E. K.

covering their vessels operating in the steam schooner trade, Party of the Second Part, hereinafter known as the "Shipowners",

Witnesseth as Follows:

* * * *

SECTION 5.

CONDITIONS OF EMPLOYMENT

Rule 1. The members of the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association shall be given preference of employment, and the parties agree that the union shall furnish unlicensed engine room personnel as required by the companies, parties to this agreement.

Rule 2. There shall be no discrimination against any man for union activity.

Rule 3. Authorized representatives of the Union shall be allowed to visit members of the Union aboard ship at any time.

Rule 4. No man shall be required to work under unsafe conditions.

Rule 5. There shall be no strikes or stoppages of work as long as the covenants of this Agreement are performed.

Rule 6 (a). When Ships Are Laid Up: Any man discharged who has been employed for fifteen days or less shall be given first-class transportation and subsistence back to the port of engagement. First-class transportation shall include railroad

ticket and berth. Subsistence shall be at the rate of \$4.00 per day, effective July 16, 1946.

(b) Men that receive transportation shall not return to the same ship within ten days.

* * * *

SECTION 7. GENERAL

Rule 1. No clarification of or change in the agreement shall be effective or issued by either party unless dated, numbered, and signed by both parties.

Rule 2. It is agreed that any changes in this agreement that are [6] mutually agreeable to both parties may be made and incorporated in the agreement at any time during the life of this agreement. Any such changes in respect to wages shall be subject to the approval of the National War Labor Board, or its successor.

* * * *

SECTION 9. PORT COMMITTEES AND LABOR RELATIONS

A "Port Committee" shall be set up in each of the following ports: San Francisco, Seattle, Portland and San Pedro.

Each Port Committee shall be composed of an equal number of members appointed by and representing each party to this agreement, but shall not exceed three members from either party. Each party shall have an equal number of votes.

The duty of each Port Committee shall be to hear and adjudicate any dispute relative to the interpretation or performance of this agreement

which may arise between the parties to this agreement, at that Committee's particular port.

After notice by either party, the Port Committee shall convene within twenty-four hours to take action on the dispute.

If any Port Committee becomes deadlocked, that Port Committee shall immediately refer the matter to the San Francisco Port Committee for decision.

If the San Francisco Port Committee becomes deadlocked upon the decision of any matter, within forty-eight hours a referee shall be selected by the San Francisco Port Committee to hear and adjudicate that particular matter.

If a referee cannot be agreed upon, either party may request the Secretary of Labor to appoint a referee to hear and adjudicate the particular dispute; such hearing shall be held in San Francisco.

The decision of the Port Committee shall be in writing and shall be binding upon both parties unless such decision is changed or revoked by the Port Committee of San Francisco.

All decisions must be referred promptly to the San Francisco Port Committee for ratification, nullification, or change.

All decisions of the San Francisco Port Committee shall be in [7] writing, signed by all members of that Committee, and shall be final and binding upon both parties to this agreement.

All decisions of a referee shall be signed by that referee and shall be final and binding upon both parties to this agreement.

All costs of the referee shall be borne equally by both parties.

SECTION 10. TERMINATION

The said agreement as hereby amended shall be binding upon the respective parties to and including June 14, 1947, and shall be considered as renewed from year to year thereafter between the respective parties hereto unless either party hereto shall give written notice to the other of its desire to amend or terminate the same.

Any such notice shall be given at least thirty days prior to the expiration date, and after such notice has been given specific proposals must then be submitted and negotiations commenced within 10 days.

If such notice shall not be given, the agreement shall be deemed to be renewed for the succeeding year.

Dated at San Francisco, July 16, 1946.

PACIFIC AMERICAN

SHIPOWNERS ASSOCIATION,

By /s/ J. B. BRYAN.

MARINE FIREMEN, OILERS,

WATERTENDERS & WIPERS

ASSOCIATION,

By /s/ V. J. MALONE.

* * * *

AGREEMENT

The Pacific American Shipowners Association and the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association hereby rescind their Memorandum of Agreement of June 14, 1947 relative to the Coastwise Trade and agree that their existing collective bargaining contract

relative to the Coastwise Trade shall be extended for a period of one year from and after June 15, 1947, without change except that the Kleinsorge Award increase in monthly wage rates shall be placed in effect retroactive to April 1, 1947 and that there shall be granted, effective as of the date of execution hereof, the additional wage increase and the holiday pay for which provision is made in paragraphs [8] 2(b) and 2(d) of the agreement of even date wherewith relative to the Offshore Trade.

Dated June 19, 1947.

PACIFIC AMERICAN
SHIPOWNERS ASSOCIATION,
/s/ J. B. BRYAN.

PACIFIC COAST MARINE
FIREMEN, OILERS, WATER-
TENDERS & WIPERS
ASSOCIATION,
/s/ V. J. MALONE.

Signed subject to approval of Maritime Commission in Respect to General Agency vessels.

Pacific Coast Marine Firemen, Oilers, Watertenders
and Wipers Association Contract Changes

Effective June 19, 1947

Revised Wage Scale

| Rating | Effective April 1, 1947 | Effective June 19, 1947 |
|-------------------------------|----------------------------|----------------------------|
| Electrician | \$312.17 | \$327.78 |
| Maintenance Electrician | 251.22 | 263.78 |
| Fireman | 190.80 | 200.34 |
| Oilers—Steam | 190.80 | 200.34 |
| Oilers—Diesel | 206.97 | 217.32 |
| Combination Men | 196.10 | 205.91 |
| Wipers | 185.50 | 194.78 |

OVERTIME RATE

Effective April 1, 1947

The rate of overtime shall be \$1.27 per hour.

HOLIDAYS

Overtime pay shall be paid for all work performed on any or the nine holidays described in the basic agreement at sea or in port. But, in the case of holidays at sea occurring on Sunday, the following Monday shall not be deemed a holiday. No double overtime shall be paid for work performed on holidays falling on Sundays and day workers shall not receive overtime pay unless required to work.

7/9/47

[Endorsed]: Filed Feb. 19, 1948.

[9]

[Title of District Court and Cause.]

MOTION FOR STAY OF PROCEEDINGS

Comes now the defendant above named and, for the reasons and upon the grounds hereinafter set forth, moves the above entitled Court for its order staying proceedings herein pursuant to Section 3 of the Federal Arbitration Act (9 U.S.C.A. Section 3).

Said motion is made upon the grounds that it appears from the face of the complaint on file herein, and the exhibit attached thereto, that one or more issues are presented which are referable to arbitration under a written collective bargaining agreement.

Said motion is based upon the said complaint, the said written collective bargaining agreement, a copy of which is attached to said complaint as an exhibit, and upon a Memorandum of Points and Authorities herewith submitted.

Said motion is further based upon the fact, which said defendant hereby asserts to be true, that the said defendant (applicant in this motion) is not in default in proceeding with such arbitration under the said collective bargaining agreement.

Dated this 12th day of May, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

By NORMAN LEONARD,
Attorneys for Defendant.

Memorandum of Points and Authorities

9 U.S.C.A. Section 3

Agostine Bros. Building Corp. vs. U. S. 142
Fed. (2d) 854 (4th Circuit)

Gerald Donahue vs. Susquehanna Collieries
Co., 138 Fed. (2d) 3 (3rd Circuit)

Shanferoque Coal & Supply Co. vs. West-
chester Service Co., 70 Fed. (2d) 297 (2nd
Circuit)

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed May 13, 1948.

[10]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 24th day of May, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Louis E. Goodman,
District Judge.

No. 27920-G Civil

COASTWISE (PACIFIC FAR EAST) LINE,
Etc.,

vs.

PACIFIC COAST MARINE FIREMEN, OIL-
ERS, WATERTENDERS AND WIPERS
ASSOCIATION, Etc.

ORDER DENYING MOTION TO STAY
PROCEEDINGS

This case came on regularly this day for hearing on motion to stay proceedings. After hearing Messrs. Brotsky and Lang, attorneys herein, it is Ordered that said motion be denied. [11]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers

Association, an unincorporated association, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order of the above entitled court denying motion to stay proceedings pending arbitration, entered in this action on the 24th day of May, 1948.

Dated June 15, 1948.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
GEORGE A. ANDERSEN,
Attorneys for Defendant.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed June 22, 1948. [12]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including September 10, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated July 30, 1948.

DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed July 30, 1948. [13]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association, an unincorporated association, defendant and appellant herein, and designates the following as the record on appeal in the above entitled matter:

1. Action for damages for breach of contract under the Labor-Management Relations Act of 1947, filed herein on February 19, 1948.

2. So much of Exhibit A attached to the foregoing as is identified below:

(a) All of page 1 thereof.

(b) All of Section 5 thereof appearing on page 5 thereof.

(c) So much of Section 7 thereof as appears on page 11 thereof.

(d) All of Section 9 and Section 10 thereof and the signatures thereon appearing on pages 15 and 16 thereof.

3. Motion for stay of proceedings filed herein on May 13, 1948.

4. Order denying motion to stay proceedings filed herein on May 24, 1948.

5. This designation of record on appeal.

Dated August 4, 1948.

GLADSTEIN, ANDERSEN,

RESNER & SAWYER,

By GEORGE A. ANDERSEN,

Attorneys for Defendant and Appellant.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Aug. 5, 1948.

[14]

[Title of District Court and Cause.]

DESIGNATION BY PLAINTIFF AND RE-
SPONDENT OF ADDITIONAL PORTIONS
OF RECORD ON APPEAL

Plaintiff and respondent, Coastwise (Pacific Far East) Line, hereby designates the following portions of the record in the above action in addition to those designated by defendant and appellant in its Designation of Record on Appeal on file herein:

1. The following portions of Exhibit A attached to the Complaint filed herein on February 19, 1948, in addition to those portions of said Exhibit A heretofore designated by defendant and appellant:

(a) The Supplementary Agreement following page 16 of said Exhibit A dated June 19, 1947 and comprising two unnumbered pages.

2. This Designation by Plaintiff and Respondent of Additional Portions of Record on Appeal.

Dated August 17, 1948.

BROBECK, PHLEGER &
HARRISON,
ROBERT E. BURNS,
Attorneys for Plaintiff and Respondent.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed August 19, 1948.

[15]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 15 pages, numbered from 1 to 15, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Coastwise (Pacific Far East) Line, a corporation, vs. Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association, an unincorporated association, Defendant, No. 27920-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$6.00 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 9th day of September, A. D. 1948.

(Seal)

C. W. CALBREATH,
Clerk.

[16]

[Endorsed]: No. 12034. United States Court of Appeals for the Ninth Circuit. Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association, an unincorporated association, Appellant, vs. Coastwise (Pacific Far East) Line, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 11, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12,035

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLIAM KOVELL,

Appellant,

VS.

PORTLAND TUG AND BARGE COMPANY,
Claimant of Barges YF 730 and
YF 618, their tackle, apparel, fur-
niture and equipment,

Appellee.

BRIEF FOR APPELLEE.

JAMES A. QUINBY,

LLOYD M. TWEEDT,

STANLEY J. COOK,

DERBY, SHARP, QUINBY & TWEEDT,

1000 Merchants Exchange Building, San Francisco 4, California,

Proctors for Appellee.

FILED
NOV 3 - 1918
J. C. GRIEN



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No. 12,035

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM KOVELL,

Appellant,

VS.

PORTLAND TUG AND BARGE COMPANY,

Claimant of Barges YF 730 and
YF 618, their tackle, apparel, fur-
niture and equipment,

Appellee.

BRIEF FOR APPELLEE.

I.

FACTS AND ISSUES.

In heavy weather off the coast of California in June, 1947, two dumb barges, without crews, were being towed northward by the tug *Mundos*. All three vessels were owned and operated by appellee, Portland Tug and Barge Company. The tow line parted between the tug and the leading barge, and appellant, second officer of the *Mundos*, libelled the barges, claiming salvage for services which, together with services rendered by other crew members, contributed to the resumption of the tow.

The trial court, after hearing the testimony of the libelant, as well as that of the tug master and other crew members, entered a final decree dismissing the libel, for reasons which are stated in the Conclusions of Law (Apos. 17), which were drawn by the Court, and are not the usual over-statements drafted by prevailing counsel. The trial court found (Apos. 17):

“That during all of the times mentioned herein the libelant, as a member of the crew and second mate of the M. V. “Mundos,” was under the duty as such second mate of caring for the said tug boat and the said barges during the time they were on the high seas; that the said libelant was not in any manner or at all relieved of such duty as such member of the crew because of the parting of the tow rope thus separating the barges from the tug boat, but remained under a continuing duty to protect and preserve the said barges and that the things done by the said libelant in so protecting and preserving the said barges were all done in performance of the duty and obligation upon him as such crewman and second mate of the M. V. “Mundos” and in performance of his said contract of employment as such.”

It is well established in maritime law that a crew member has no salvage right for services rendered to property in his care, unless his contract of employment has been terminated, either by abandonment or discharge, prior to the performance of such services. In his libel (Apos. 2, par. III), Kovell contended faintly for the abandonment theory, claiming that “* * * the Captain of the tug abandoned efforts to board the barges. * * *” He further claimed (and apparently still insists) that volun-

teering for a job rather than acting under orders, may of itself entitle a crew member to a salvage award.

Appellant's major contention, however, is that Kovell was a crew member of the tug only, and that his pre-existing duty to the tug did not prevent him from acting as a stranger to the barges. All these questions were resolved by the trial court adversely to appellant, and no new issue is presented on appeal. Under these circumstances, the burden upon appellant has been defined as follows by this Court in *The Heranger*, 101 F. (2d) 953, 957 (9 C.C.A.):

“This Court has adhered to the rule that findings and conclusions of the District Court in an admiralty case will be affirmed on appeal, unless the record discloses some plain error of fact or misapplication of some rule of law.”

Other circuits subscribe to the same rule in the following decisions:

Hodges v. Standard Oil Co., 123 F. (2d) 362, 363 (4 C.C.A.);

Johnson v. Andrus, 119 F. (2d) 287, 288 (2 C.C.A.);

Petterson Lighterage & T. Corp. v. New York Central Ry. Co., 126 F. (2d) 992, 995 (2 C.C.A.).

II.

ONE WHO OWES A DUTY OF CARE CANNOT CLAIM SALVAGE.

In “The Law of Civil Salvage”, Kennedy, 3d Ed., the leading work on the subject, are found the following definition and comment:

“A salvage service * * * may be described * * * as a service which saves or helps to save maritime property * * * when in danger * * * if and so far as the rendering of such service is voluntary, and attributable neither to legal obligation, nor to the interest of self-preservation, nor to the stress of official duty.” (p. 2.)

“In accordance with this just principle of rewarding only volunteers as salvors, neither the crew nor the pilot navigating the ship, nor the owner or the crew of the tug towing it under a contract of towage nor the ship’s agent are ordinarily held entitled to obtain salvage reward in respect of the services rendered by them in the preservation of the ship herself or of the lives or the cargo which she carries; for all of these persons are under a pre-existing obligation to work in their respective ways for the benefit of the life and property at risk.” (p. 30).

Appellant recognizes this distinction at pp. 13-14 of his brief, quoting appropriate language from *The Sabine*, 101 U.S. 384; 25 L. Ed. 982.

The reason for the rule is well expressed by Justice Story of the Supreme Court of the United States in the case of *Hobart v. Drogan*, (10 Pet. 108; 9 L. Ed 363), quoting in part from *The Neptune*, (1 Hagg. Adm. R. 236-237) :

“ ‘What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful services, and gives it as a volunteer adventurer without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship.’ And it must be admitted that, however harsh the rule may seem to be in its actual

application to particular cases, it is well founded in public policy, and strikes at the root of those temptations which might otherwise exist to an alarming extent, to seduce pilots and others to abandon their proper duty, that they might profit by the distresses of the ship which they are bound to navigate.”

Further recognition of the rule is found in the following language from *The John Perkins*, (Fed. Cas. No. 7360):

“* * * if the crew, or individuals of them, may become salvors, the owners, as in this case, may have no protection arising from the presence of those to whose charge they committed their property, since these are the very persons setting up the hostile claim * * *” (p. 705.)

It is not denied that the facts do credit to the courage of the appellant, but bravery, as a single element, is not sufficient to justify an award of salvage. As stated in *Kidney v. The Ocean Prince*, 38 Fed. 259, 261:

“The sense of duty which prompts a sailor to be skillful, daring, and brave, or a passenger to be zealously active in his efforts to rescue his vessel from the perils of the sea, grows out of the reciprocities which substantially inhere in their relations to the ship.”

See also:

Aurora, 73 F. Supp. 607, 1947 A.M.C. 983;

Mary M., 1938 A.M.C. 1237 (D.C. N.D. Calif.;

Roche, J.) (No Federal Citation);

Albionic, 58 Times L.R. 154 (1942);

The Macona, 269 Fed. 468.

III.

APPELLANT OWED A DUTY OF CARE TO THE BARGES.

When Kovell was employed by the owner of the three vessels comprising the flotilla, he knew that his job was to assist in the navigation and care of all three. If this man is entitled to salvage, then, in the words of *The John Perkins* (supra), the owners “may have no protection arising from the presence of those to whose charge they committed their property, since these are the very persons setting up the hostile claim”.

Can it be denied that appellant was “one of those to whose charge” the Portland Tug and Barge Co. committed these barges?

The attempted distinction between tug and barges is meaningless. It is similar to, but weaker than the distinction attempted in

The Eastern Shore, 15 F. (2d) 82

where a crew owed a duty to a ferryboat company to care for and operate two vessels, alternately. A crew member who was signed on vessel A for the next day’s trip, voluntarily assisted in putting out a fire on vessel B. The Court, in denying salvage because of an existing duty, said (p. 83):

“But I do not think that it can be said that this crew was specifically attached or exclusively attached to either vessel. Manifestly they were there to be used on both vessels, as the occasion might require.”

It is equally manifest that Kovell and his fellow crewmen were there to be used on the tug or the barges, as the occasion might require.

All the witnesses, save only appellant himself, either affirmed or reluctantly recognized the existence of a duty or relationship to the barges, covering the services performed.

McAdams (Apos. 49):

“A. Well, the duty is to protect your tow and tow-boat at all times. At least, that has been the practice on all the vessels that I have ever sailed on. I might add that Capt. Sullivan’s orders were carried out as near as humanly possible from the time the barges were adrift until we retrieved them—by every member of the crew.

Q. Were you or were you not acting in the course of your regular duty as a member of the crew of the tug *Mundos* when you manned the lifeboat and went alongside the barge?

A. Yes, I was acting in the course of duty. I might say we went through the same procedure in February 1947 where we lost our tow off the coast of Mexico and all of the members of the crew helped to retrieve the barges as on this occasion, but one barge sank.”

Sullivan (Apos. 145):

“Q. Captain Sullivan, in your opinion were the services performed by these men in the lifeboat within the scope of the duties of the members of your crew?

Mr. Gay. I will object to that question as giving a conclusion on a matter that is at issue.

The Court. Hasn’t the libelant testified that it was not?

Mr. Quinby. The libelant has testified that it was not. Certainly Captain Sullivan is better qualified by experience to answer that.

The Court. At least he was captain of the tug at the time. I will overrule the objection.

A. It is the duty of the tug and its crewmen to protect at all times the vessel and its tow because the tow is a part of the vessel in actuality; it is like one vessel; and in case of an emergency it is the duty of the crew to do all in their power to retrieve the barges that were lost, so I would consider that it was part of their duty to go in the lifeboat and retrieve the barges the same as in any other case."

Kobbe (Apos. 67):

"Q. Are you familiar with the duty of a member of a crew of a towing vessel toward its tow at times when the tow is in distress?

* * * * *

A. The crew of a tow boat should do everything possible to pick up their own tow, if possible."

Edwards (Apos. 111, under cross-examination):

"Q. There was a time that you felt you should have more compensation for what you did, was there?

* * * * *

A. I always felt this way, it is a part of your job; * * *"

Parker (Apos. 34), (when asked if Kovell was acting in the course of his regular duty):

"A. Yes; as I see it, that was his job."

Vittum (Apos. 58):

"Yes, that was his duty."

Regardless of what these men said, or how well they expressed themselves—(Edwards, for example, was un-

duly impressed by the fact that the services were “voluntary”)—their failure to claim salvage is the best indication of their true belief. A similar situation arose in

Drevas v. United States, 58 Fed. Supp. 1008, 1011 where the Court, in denying salvage to a single crew member, used the following significant language:

“No claim for salvage has been made by the master or other members of the crew who participated in taking the ship into port.”

It should be remembered that Edwards, Parker, Kobbe, McAdams and Vittum were not, at the time of the trial, employed by the owner of the *Mundos*, and their testimony is presumptively free from bias.

We cannot refrain from comment upon the tactics of appellant in filing his action on behalf of Edwards, McAdams and Kobbe, all of whom categorically denied authorization or knowledge of such action. (Edwards, Apos. 96-97; McAdams, Apos. 50; Kobbe, Apos. 69-70.) Appellant failed to contradict these denials. This device, which obviously was intended to high-pressure his fellow crew members into joining and lending weight to his questionable salvage action, falls short of that high degree of probity required of a libellant before the quasi-equitable bar of admiralty. It casts a shadow upon the conceded gallantry and seamanship displayed by Kovell at the time his service was rendered.

In contrast to all the other witnesses, appellant impelled by self-interest and the direct question of his counsel, testified as follows (Apos. 133):

“Q. Now, Mr. Kovell, in your opinion as a master mariner under these circumstances, were the efforts and the maneuvers that the tugboat and the members of the tugboat went through in order to pick up and save the barges, part of the usual duties of a tugboat?

A. I do not think so; a crew member of a tug is assigned to the tug and is not assigned to the tow.”

It is clear, upon the weight of the evidence, that the crew owed a duty to the barges. Such duty does not depend merely upon the testimony of witnesses, but is inherent in the relationship of the crew members to their employer. The tug and barges were entrusted solely to Captain Sullivan and his crew. In effect, the Portland Tug and Barge Company said to these men, “Here is certain property consisting of a tug and two barges, all belonging to your employer. Take this property in your possession. Protect it and care for it during the voyage from San Diego to Seattle. For such service we will pay you wages at a specified rate.”

When Kovell and his fellow crew members set out on the voyage, they accepted this understanding, which was implicit in the very nature of the undertaking. There is no contract of towage involved here, as there is in the cases cited by appellant. The only contract in the picture is the implied contract for services between Kovell and his employer. If appellant was a locomotive engineer, he could not deny a duty to the freight cars in his train. As a driver of a truck, Kovell could not, without breach of duty to his employer, drive away and

leave his trailer standing in the road with a broken coupling.

It may be that the duty is so obviously dangerous, under certain circumstances, that non-performance is excused. This fact, however, does not negative the existence of a duty, nor alter the relationship of the employee to the property entrusted to his care.

These barges were what is known as "dumb barges". They had no one aboard, and no means of steering or propulsion. If Kovell, as his counsel now contends, owed his duty solely to the tug, we reach the obviously false conclusion that nobody was taking care of the barges. If they happened to tag along and reach their destination without untoward incident, well and good, but if the tow line broke, and the custodians of the venture refastened it, any one of them could hold a legal gun at the head of the employer and exact tribute. The mere statement of such contention reveals its absurdity.

For all practical purposes, Kovell was a member of the crew of the barges. As stated by Sullivan (Apos. 145) "* * the tow is a part of the vessel, in actuality; it is like one vessel; * *". If appellant wasn't committed to care for the barges, who was? It is repugnant to the dictates of common sense and maritime tradition that any vessel be consciously navigated without human guidance.

IV.

THE SINGLE IDENTITY OF TUG AND DUMB BARGE, JOINTLY OWNED AND OPERATED AS A SINGLE UNIT, IS LEGALLY RECOGNIZED.

In an action for damage to cargo on a barge towed by a tug, the vessels being under common ownership, the combination of tug and tow is considered as one vessel.

San Joaquin No. 4-Tennessee (Sacramento Navigation Co. v. Salz), 273 U.S. 326; 71 L. Ed. 663; 1927 A.M.C. 397, 399:

“The fact that we are dealing with vessels, which by a fiction of the law are invested with personality, does not require us to disregard the actualities of the situation, namely, that the owner of the tug towed his own barge as a necessary incident of the contract of affreightment, and that the transportation of the cargo was in fact effected by their joint operation. The bill of lading declares that the cargo was shipped on board the barge. But it was to be transported; and this the barge alone was incapable of doing, since she had no power of self-movement. It results, necessarily, that it was within the contemplation of the contract that the transportation would be accomplished by combining the barge with a vessel having such power. Respondent says there was an implied contract to this effect;—that is, as we understand, a distinct contract implied in fact. But a contract includes not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made, 3 *Williston on Contracts*, Sec. 1293; *Brodie v. Cor-*

poration of Cardiff (1919), A.C. 337, 358; and there is no justification here for going beyond the contract actually made to invoke the conception of an independent implied contract."

There is no more reason here to conclude that Kovell's contract of employment related solely to the tug than there was in the foregoing case to urge that the contract of carriage applied solely to the barge.

And in *The Columbia*, 73 Fed. 226 (9 C.C.A.), a case requiring the surrender of a jointly owned tug and barge under the Limitation Statute, Judge Ross says (p. 237):

"When the tug made fast and took in tow the barge, to perform the contract of carriage, the tow became one vessel for the purpose of that voyage—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines."

And in the same case, at p. 238, quoting from *The Northern Belle* (9 Wall. 526, 19 L. Ed. 746), the Court restates the rule in the following language:

"The barges are owned by the same persons who own the steamboats by which they are propelled, and are generally considered as attached to and making part of the particular boat in connection with which they are used, though quite often an individual or corporation owning several boats running in a particular trade have a large number of barges, which are taken in tow by whatever boat of the same line may be found most convenient. In every case, however, the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage."

We do not contend that mere joint ownership, standing alone, will defeat the right of salvage on behalf of the crew of one vessel against another, jointly owned but operated on a separate, distinct voyage. Thus in

Jacobson v. Panama R. Co., 266 Fed. 344,
the *Panama* went aground. Later, the *Neptunas* came along and rendered assistance. It is obvious that the crew of the *Neptunas*, in the absence of special contract, owed no duty to the *Panama*. An interesting case sustaining this obvious theory, and containing some facts similar to those now before us, is

The Colima, 6 Fed. Cas. No. 2996.

We have no quarrel with these cases. If the *Mundos* had happened upon another vessel owned by the Portland Tug and Barge Co., engaged upon a separate and distinct voyage, and had rendered assistance to such vessel, we concede that her crew, having no employee relationship to the salved craft, would be entitled to salvage.

In the present case, however, Kovell and the others on the tug had a very clear and definite duty to care for all the property entrusted to their care, including the barges. To give them full credit, they discharged this duty, and did a good job. This job was what they were hired to do, and what they were paid for.

Handling barges in off-shore towage is a hazardous operation. Tow lines often break, and the very thing which happened here must have been within the assumed contemplation of Kovell when he signed on, or even earlier, when he decided to go to sea. While not be-

littling the services rendered by appellant and the remainder of the crew, we consider that his case falls squarely within the following language of the Court in

The Albion, 58 Times L. R. 154, 155 (1942):

“The appellant, and those associated with him, in the events out of which this litigation arises, performed what were obviously very gallant and very efficient services. As the reward for those services, they must be content with the knowledge that they performed their duty in the best traditions of the service to which they belonged. For the circumstances of the case, in my opinion, clearly make it impossible to take the view that, when they performed those services, they had ceased to be bound by their contracts of employment and had become volunteers entitled to be treated as strangers to the ship, and, therefore, entitled to pecuniary remuneration for salvage services.”

V.

THE MERE FACT THAT KOVELL VOLUNTEERED DOES NOT ENTITLE HIM TO SALVAGE.

Appellant's brief is replete with statements that Kovell “volunteered” for his service, rather than acting under the specific orders of Captain Sullivan. From this fact, a false inference is drawn which inferentially places Kovell in the category of a “volunteer”, or stranger to the venture. As indicated by the facts and language of the following cases, in all of which salvage was denied, this distinction has no effect when, as here, the service is performed in accord with a pre-existing relationship to the imperilled property.

The Lyman Abbott, 66 Fed. Supp. 788; 1946 A.M.C. 759.

Part of crew, in response to a request for volunteers, went back on their ship, which was loaded with explosives and under air attack.

“(Fed. Supp. p. 797) Nor is the libellants’ cause strengthened by the contention that the men were asked to volunteer rather than ordered to return. As to the first group who accompanied Dahlstrom at 2:00 A.M., it must be clear that he was constrained not to put any one under the necessity for refusing to obey and to follow him into a position of obvious peril, and therefore he made the request which four of those under him honored.”

The Comet, 205 Fed. 991.

Members of crew rowed forty miles to obtain help for disabled vessel, then libelled for salvage, alleging “extra hazardous services performed by libelants outside the scope of their employment.”

(p. 993) “The mere fact that the master called for volunteers to secure assistance and libelants answered the call would not effect their discharge, entitling them to salvage.”

The Portreath, XVI Aspinall’s Maritime Cases 227.

Crew members returned to vessel in danger of sinking after collision.

(p. 229) “The fact that the master called for volunteers instead of ordering the crew to go back appears to me to have no bearing on the case.”

Elrod v. Luckenbach S. S. Co., 62 Fed. Supp. 935,
1945 A.M.C. 1100.

In order to save his stranded vessel, the master (p. 937) “* * * asked for volunteers, every member of the crew responded, and four were selected * * *.”

Drevas v. United States, 58 Fed. Supp. 1008, 1945
A.M.C. 254.

Crew members returned to torpedoed vessel, in danger of sinking.

(p. 1011) “Attention is called to the fact that they volunteered for the service and were not ordered by the master to undertake it. The evident reason why the master did not give an order was the then uncertainty as to the continued safety of the ship.”

VI.

TOWAGE CONTRACT CASES ARE NOT IN POINT.

The authorities cited by appellant in his brief (pp. 18-20) establish merely that a tug-owner, contracting at arm's length with the owner of a towed vessel, may receive an award over and above the contract price, for services in excess of those contemplated by the contract. In those cases the towed vessel was fully manned, and her owner was dealing with the owner of the tug.

The issue here is not between tug and tow, but between the employee on the one hand, and the owner on the other, of both tug and tow. Here, there was no towage contract between the vessels—there couldn't be, since they had a single owner and operator. Kovell, as serv-

ant of the owner, and custodian of both tug and tow, can have no benefit from any assumed, imaginary contract between the vessels.

The only contract before the Court is the contract of employment between appellant and his employer, and the only question arising under that contract is this: At the time his services were rendered, was Kovell one of the custodians of the barges, owing his employer a duty to care for them?

The trial Court, after full hearing and upon ample evidence, answered this question in the affirmative.

VII.

CONCLUSION.

From the viewpoint of the amount of any potential award, this case is unimportant. The barges were ultimately towed into port by the combined efforts of three valuable tugs and their crews. Even if appellant had been a stranger to the venture, his share of any reasonable salvage award would probably fall short of the cost of defending the present action.

In principle, however, the case is vital to the shipping industry. If a crew member is held entitled to salvage under the facts here presented, tug owners face an intolerable situation. They cannot estimate their cost of operation, since crews will no longer be working for wages, but for wages plus a potential undetermined share of the property towed. In effect, a crew member would be

offered a title interest in property entrusted to him, as an incentive to insure his best efforts to complete the voyage.

It is the magnitude of this danger, rather than the complexity of the issue, which has led us to treat the matter at some length.

The essential question here is quite simple. A person owing a duty of care to property, or having any similar relationship to it, cannot claim salvage for services rendered to such property. Kovell assumed such duty, and entered into such relationship, when he agreed with his employer to care for the *Mundos* and the barges on the voyage. This agreement was just as binding as if the property involved had been one vessel, instead of three. The services he rendered were part of his recognized duty to his employer and to the property entrusted to him. For such services, no matter how meritorious, he is not entitled to salvage.

The decree of the District Court should be affirmed.

Dated, San Francisco, California,

November 1, 1948.

Respectfully submitted,

JAMES A. QUINBY,

LLOYD M. TWEEDT,

STANLEY J. COOK,

DERBY, SHARP, QUINBY & TWEEDT,

Proctors for Appellee.

No. 12036

United States
Court of Appeals
for the Ninth Circuit

VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK, Tax Commissioner of
the Territory of Hawaii,

Appellee,

Transcript of Record

Upon Appeal from the Supreme Court for the
Territory of Hawaii

OCT 5 - 1948

PAUL P. O'BRIEN,
CLERK

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* Page numbering appearing at foot of page of original
certified Transcript of Record.

District Court of Ewa, County of Honolulu,
Territory of Hawaii

WILLIAM BORTHWICK, Tax Commissioner of
the Territory of Hawaii,

Plaintiff,

vs.

VICTOR J. VEATCH,

Defendant.

BANK OF HAWAII, Pearl Harbor Branch, and
the BISHOP FIRST NATIONAL BANK OF
HAWAII, Hickam Branch,

Garnishees.

COMPLAINT AND SUMMONS

COMPLAINT

Comes now William Borthwick, Tax Commissioner of the Territory of Hawaii, plaintiff above-named, and complaining of the above-named defendant, alleges as follows:

I.

That he is the duly appointed, qualified and acting Tax Commissioner of the Territory of Hawaii.

II.

That said defendant is in the Ewa District, County of Honolulu, Territory of Hawaii, and within the jurisdiction of the above entitled court; that the Bank of Hawaii (Pearl Harbor Branch), one of the garnishees above-named, is a corporation organized and doing business under the laws of the Territory of Hawaii, and has a branch at Pearl Harbor, District of Ewa, County of [4] Honolulu

aforesaid; that the Bishop First National Bank of Hawaii (Hickam Branch), is a corporation organized and doing business under the laws of the Territory of Hawaii and has a branch at Hickam Field, Ewa District, County of Honolulu aforesaid.

III.

The defendant is indebted to the Territory of Hawaii for compensation and dividend taxes, pursuant to Chapter 98 of the Revised Laws of Hawaii 1945, as amended, on the tax books, tax lists and assessment records in the custody of the Tax Commissioner, together with penalties and interests thereon as follows:

| Year | Tax | Penalty | Interest to 10/31/46 | Total |
|------|---------|---------|-------------------------|---------|
| 1944 | \$12.02 | \$1.20 | \$1.85 | \$15.07 |
| 1945 | \$74.69 | \$7.47 | \$6.57 | \$88.73 |
| 1946 | \$48.29 | \$3.00 | \$.65 | \$51.94 |

together with interests, commencing 1 November 1946 at the rate of $\frac{2}{3}$ of 1% per month or fraction thereof on the amount of the taxes and penalties.

IV.

That the said defendant, though thereunto requested, has thus far failed and neglected and does still neglect and refuse to pay such taxes, penalties and interests, or any part thereof. [5]

V.

That plaintiff is informed and believes and upon such information and belief alleges that goods or effects of the defendant are concealed in the hands of the above-named garnishee as attorney, agent, factor, banker or trustee, so that they cannot be found to be attached or levied upon, or that debts are due from the said garnishees to the said de-

fendant, or that the said garnishees are the persons from whom the defendant is in receipt of a salary, stipend, commissions, or wages.

Wherefore, plaintiff prays that a garnishee summons issue out of this court, and for judgment against said defendant in the sum of \$155.74 together with interest to accrue as aforesaid and the costs herein incurred, and for such other relief as may seem just and proper.

Dated at Honolulu, T. H., this 29th day of November, 1946.

/s/ WM. BORTHWICK,
Tax Commissioner of the
Territory of Hawaii.

(Duly Verified.) [6]

GARNISHEE SUMMONS

The Territory of Hawaii:

To the High Sheriff of the Territory of Hawaii, or his Deputy; the sheriff of the County of Honolulu, his Deputy, or any Police Officer of the District of Honolulu, County of Honolulu, Territory of Hawaii:

You Are Commanded to summon Victor J. Veatch, Defendant, if he can be found in this District, to appear before the District Magistrate of Ewa, at his Court Room in Pearl City, Ewa, 10:30 a.m., on the first Friday, following the date of service, and should such Friday be a legal holiday, then upon the next secular day, to show cause why the claim of William Borthwick, Tax Commissioner

of the Territory of Hawaii, Plaintiff, should not be awarded to him pursuant to the tenor of his annexed complaint or declaration.

Notify said defendant that if he fail to attend at the above named time and place judgment will be entered against him *ex parte*, by default.

And You Are Also Commanded to leave a true and attested copy of this Writ with the Bank of Hawaii, Pearl Harbor Branch, and the Bishop First National Bank of Hawaii, Hickam Branch, the attorneys, agents, factors, trustees, or debtors, of the above named Defendant, and being the person from whom the defendant is in receipt of any salary, stipend, wages, annuity or pension, or at the place of their usual abode, and summon them to appear personally in said Court at the time and place above named, or to file a written return as provided by law, and, on oath, disclose whether they or at the time said copy was served, had any of the goods or effects of the Defendant in their hands, and, if so, the nature, amount and value of the same, or whether they are indebted to the Defendant, and, if so, the amount and nature of such debt or whether the Defendant, at said time of service, was in receipt from said garnishee of any salary, stipend, wages, annuity or pension, and, if so, the amount or rate thereof.

Notify the Said Garnishee that upon default to attend at the time and place above mentioned, or to file such written return, execution will be issued against their proper estate for the amount of such judgment as the Plaintiff may recover against the Defendant.

And You Are Further Commanded To Make Due

Return On This Summons With Your Doings,
Thereon.

Given Under My Hand this 19th day of December, 1946.

R. M. YATES,
Judge, District Court of Ewa, County of Honolulu,
Territory of Hawaii. [8]

Served the within Summons on Victor J. Veatch therein named as defendant by handing him a true and attested copy thereof and at the same time showing him the original, at Hickam Field, T. H., this 7th day of January, 1947.

146 Gardner Ave. 4:30 p.m.

JOHN YOUNG,
Deputy High Sheriff.

Served the within Summons on Mr. S. A. Parish, branch mgr., who accepted service for Bishop First National Bank of Hawaii, Hickam Branch, therein named as garnishee by leaving with him a true and attested copy thereof at Hickam Field, T. H., this 7th day of January, 1947.

/s/ JOHN YOUNG,
Deputy High Sheriff.

Served the within Summons on Mr. B. Wong, accountant, who accepted service for Bank of Hawaii, Pearl Harbor Branch, therein named as garnishee by leaving with him a true and attested copy thereof at Pearl Harbor, T. H., this 7th day of January, 1947.

/s/ JOHN YOUNG,
Deputy High Sheriff.

[Endorsed]: Filed and issued 12/19/46. Thomas L. Miki, Clerk, Honolulu District Court of Ewa.

[Title of District Court and Cause.]

DEMURRER

Comes now the Defendant above named, by Hyman M. Greenstein, his attorney, and demurs to the complaint on file herein on the following grounds:

I.

The Defendant, being employed at Hickam Field, does not receive compensation for "personal services performed within the Territory" within the meaning of Sec. 5342 R.L.H. 1945, and hence is not subject to the Compensation and Dividends Tax Law.

II.

The Territory of Hawaii does not have jurisdiction over the person of federal employees living and working on military reservations to permit it to impose a tax on compensation derived from such employment.

III.

The Defendant is a federal employee, living on land reserved for purposes of the United States Army and working [10] on a military reservation, and hence is not subject to the jurisdiction of the Territory of Hawaii in connection with matters arising out of such employment.

IV.

The Compensation and Dividends Tax Law as applied to persons working in military establishments is unconstitutional and in violation of Clause 17 of Art. I, Sec. 8, of the Constitution of the United States which grants exclusive power of leg-

islation over such areas to the Congress of the United States.

V.

A federal employee is not subject to taxation by the Territory of Hawaii on compensation received for personal services performed by him for the United States Government in the absence of specific authority or consent granted either in the Organic Act or by other Act of Congress. Nothing in the Organic Act for the Territory of Hawaii, nor any other act of the Congress of the United States specifically grants unto the Territory such power of taxation.

VI.

The taxation by the Territory of Hawaii of the compensation of federal employees living on military reservations is not a "rightful subject of legislation" within the meaning of Section 55 of the Organic Act for the Territory of Hawaii.

VII.

The imposition of a tax on the compensation of federal employees working and living within areas reserved for military or naval purposes works an undue burden on the Government of the United States.

VIII.

The provision in the Compensation and Dividends Tax Law exempting members of the Armed Forces on active duty renders said act unconstitutional on the following grounds: [11]

(a) It grants special privileges and immunities to individuals without the same having been approved by Congress, as is required by Sec. 55 of the Organic Act.

(b) It is discriminatory in that it exempts members of the Armed Forces on active duty but does not exempt federal employees living and working on military or naval reservations or areas reserved for purposes of the army or navy of the United States.

IX.

That said tax law is discriminatory in that it subjects Defendant, as a federal employee, to the penalty of fine and imprisonment, to which employees of private persons are not subjected.

X.

That said tax law is discriminatory in that it subjects Defendant, as a federal employee, to the burden of filing returns while employees of private persons are not so burdened; and in that Defendant's employer (the United States) is not required to make deductions on account of said tax, while employers of private persons are so required.

XI.

That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th Amendment to the Constitution of the United States in that he is taxed upon compensation, a portion of which he never actually receives; his gross compensation being first subject to deduction for federal income withholding taxes.

XII.

That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and 14th Amendments to the

Constitution of the United States [12] in that said tax is imposed without regard to whether or not the tax payer is already so subject to taxation by the state of his domicile.

XIII.

That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and 14th amendments to the Constitution of the United States in that the rate of said tax is discriminatory—salaried persons being subject to a 2% tax, while persons engaged in businesses, professions, or as wholesalers, manufacturers, producers, etc. are subject to a tax at a lesser rate.

XIV.

That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and 14th amendments to the Constitution of the United States in the following respect:

Said tax law is imposed in co-ordination with the income tax law and credit up to 75% paid under said tax law is credited as against the amount due under said Income Tax Law, certain personal exemptions being allowed under said Income Tax Law—but no provision is made for the return to taxpayer of any monies he may have paid in excess of that due under the Income Tax Law after giving credit for the personal exemptions that are allowed—thus in effect imposing a higher tax rate on the low income bracket taxpayer.

XV.

That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and 14th amendments to the Constitution of the United States in that said tax is oppressive and carries an unfair share of the entire tax load of the Territory of Hawaii. [13]

XVI.

That said tax law is unconstitutional as applied to the Defendant in that it is an example of "taxation without representation".

Wherefore, Defendant prays that this demurrer be sustained, and that the complaint against him be dismissed.

Dated at Honolulu, T. H., this 31st day of October, 1947.

VICTOR J. VEATCH,

Defendant,

By /s/ HYMAN M. GREENSTEIN,

His Attorney.

CERTIFICATION OF COUNSEL

I, Hyman M. Greenstein, an attorney at law, duly admitted and licensed to practice law in all the courts of the Territory of Hawaii, and attorney for the Defendant herein do certify that the foregoing demurrer is not interposed for the purpose of delay, and in my opinion is well taken in point of law.

/s/ HYMAN M. GREENSTEIN. [14]

[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between the parties through their respective counsel, that the within case shall be tried on the following facts:

1. That defendant Victor J. Veatch, is a civilian employee of the United States Army, Hawaiian Air Material Area, working and living at Hickam Field, Oahu, Territory of Hawaii.

2. That for his services as such employee of the United States Army, defendant received during the periods below stated, the following compensation:

| | |
|---------------------------------|-----------|
| October to December, 1944..... | \$ 601.00 |
| The year 1945..... | 3,734.50 |
| January to September, 1946..... | 2,414.40 |

That defendant admits that the amount of taxes, penalties and interest sought to be recovered, as set forth [16] in Paragraph III of the Complaint are correct, if any taxes are due, but that defendant denies he is subject to said Compensation and Dividends Tax Law.

3. That the services for which such compensation was received, were performed within Hickam Field, Oahu, Territory of Hawaii.

4. That said area of Hickam Field, wherein said defendant is employed and lives is a military reservation of the United States.

5. That defendant is domiciled in and a citizen of the State of Colorado, and owns his own home at 444 Cooper Avenue, Colorado Springs, Colorado, and pays real estate and personal property taxes in connection therewith.

6. That defendant has returned the compensation above set forth for taxation under the net income tax law of the State of Colorado and has paid a net income tax thereon without claiming or receiving any credit on account of his tax liabilities, if any, to the Territory of Hawaii.

7. The major revenues received from taxation by the Territory of Hawaii for the period of time from 1943 to date are as set forth in Exhibit "A", attached hereto and made a part hereof.

8. That this stipulation is entered into without prejudice to the right of either party to contend that the facts herein stipulated to, or some of them, are irrelevant and immaterial.

Dated at Honolulu, T. H., this 31st day of October, 1947.

/s/ RHODA V. LEWIS,
Assistant Attorney General,
Attorney for Plaintiff.

/s/ HYMAN M. GREENSTEIN,
Attorney for Defendant. [17]

EXHIBIT "A"

Major Tax Revenues Received by the Territory of
Hawaii from July 1, 1943, to June 30, 1947

| | Biennium 1943-1945 | Biennium 1945-1947 |
|---|-----------------------|-----------------------|
| Real Property..... | \$12,803,871.32 | \$14,254,133.82 |
| Personal Property..... | 7,827,053.15 | 7,934,809.45 |
| Income, personal and corporation | 7,851,107.57 | 6,426,818.09 |
| Public utility..... | 3,435,077.47 | 3,704,098.77 |
| Liquid fuel..... | 3,269,506.75 | 5,434,611.56 |
| Compensation and dividend..... | 14,523,446.81 | 17,552,490.93 |
| Bank excise..... | 100,000.00 | 137,500.00 |
| Liquor..... | 3,210,298.23 | 3,414,336.88 |
| Tobacco..... | 830,887.22 | 936,628.14 |
| Gross income and consumption..... | 20,829,531.78 | 23,982,503.83 |
| Unemployment compensation..... | 3,619,833.29 | 3,543,085.66 |
| <hr/> | | |
| Administered by Tax Commissioner..... | \$78,300,613.59 | \$87,321,017.13 |
| <hr/> | | |
| Inheritance and estate..... | \$ 595,283.37 | \$ 1,430,872.94 |
| Insurance..... | 843,034.22 | 978,189.94 |
| <hr/> | | |
| Administered by Territorial Treasurer..... | \$ 1,438,317.59 | \$ 2,409,062.88 |
| <hr/> | | |
| Total..... | \$79,738,931.18 | \$89,730,080.01 |
| <hr/> | | |

District Court of Ewa, County of Honolulu,
Territory of Hawaii

WILLIAM BORTHWICK, Tax Commissioner of
the Territory of Hawaii,

Plaintiff,

vs.

VICTOR J. VEATCH,

Defendant,

BANK OF HAWAII, Pearl Harbor Branch, and
the BISHOP FIRST NATIONAL BANK OF
HAWAII, Hickam Branch,

Garnishees.

JUDGMENT

I hereby certify that on the day of October, A. D. 1947, in the above entitled cause, the District Magistrate of Ewa, County of Honolulu, Territory of Hawaii, gave judgment for the plaintiff above named and against the defendant above named for the following item in the following amount:

Compensation and Dividend Taxes \$237.35

Together with interest to accrue thereon from and after November 1, 1947, at the respective rates as provided by law.

The garnishees herein are hereby ordered to withhold from the salary, stipend, wages, annuity, pension or commissions then due and belonging to the defendant herein at the time of service of process, 10% of the first \$100.00 thereof, and 20% of the amount thereof in excess of \$100.00, and at the same rates of percentage and proportion of any further salary, stipend, wages, annuity, pension or

commission that might have thereafter become due to said defendant, and pay such amount or amounts so withheld to the plaintiff herein, or his, her or its attorney, until the judgment herein and the legal interest thereon are fully paid, or until further order of the above entitled court.

Dated: Pearl City, Honolulu, T. H., Oct. 31st, 1947.

/s/ ROBERT M. YATES,

District Court of Ewa, County of Honolulu, Territory of Hawaii. [20]

[Title of District Court and Cause.]

NOTICE AND CERTIFICATE OF APPEAL

I Hereby Certify that on the 31st day of October, 1947 in the above entitled cause, I, the District Magistrate of Ewa, County of Honolulu, Territory of Hawaii, gave judgment for the plaintiff above named and against the defendant above named for the following item in the following amount:

Compensation and Dividend Taxes....\$237.35

Together with interest to accrue thereon from and after November 1, 1947, at the respective rates as provided by law.

That an appeal from said judgment was duly

noted by the Defendant above-named to the Supreme Court of the Territory of Hawaii, on points of law, and that said appeal has since been duly perfected.

A full and correct copy of my record in said case is hereto attached.

Given under my hand this 31st day of October, A. D. 1947.

/s/ ROBERT M. YATES,
District Magistrate of Ewa, City and County of
Honolulu, Territory of Hawaii.

Memorandum of Cost

Appeal costs, \$25.00; total sent up herewith, \$25.00. [21]

[Title of District Court and Cause.]

MAGISTRATE'S CERTIFICATE OF APPEAL

I hereby certify that on the 31st day of October, 1947, in the above entitled cause, judgment was entered against the Defendant in the amount of \$237.35.

This is a civil suit brought by the Tax Commissioner of the Territory of Hawaii, against Victor J. Veatch, Defendant, and certain Garnishees, for taxes due and owing the Territory of Hawaii pursuant to the Compensation and Dividends Tax Law.

Defendant is a civilian employee of the U. S.

Army, living and working at Hickam Field, Oahu, Territory of Hawaii.

A Demurrer was filed in behalf of the Defendant challenging the constitutionality of the Compensation and Dividends Tax Law as applied to persons working and living in military reservations.

Said Demurrer was overruled; and the case tried on an Agreed Statement of Facts, which statement admitted the amounts complained of in the Complaint but challenged the applicability of said law to persons working and living on a military reservation. [23]

The case being submitted on the Agreed Statement of Facts, judgment was entered as hereinabove set forth.

I further certify that the points of law involved herein are as set forth in the Demurrer, in that the constitutionality of the Compensation and Dividends Tax Law is challenged by the Defendant herein on the following grounds:

1. The Defendant, being employed at Hickam Field, does not receive compensation for "personal services performed within the Territory" within the meaning of Section 5342 R.L.H. 1945, and hence is not subject to the Compensation and Dividends Tax Law.

2. The Territory of Hawaii does not have jurisdiction over the person of federal employees living and working on military reservations to permit it to impose a tax on compensation derived from such employment.

3. The Defendant is a federal employee, living on land reserved for purposes of the United States Army and working on a military reservation, and hence is not subject to the jurisdiction of the Territory of Hawaii in connection with matters arising out of such employment.

4. The Compensation and Dividends Tax Law as applied to persons working in military establishments is unconstitutional and in violation of Clause 17 of Art. I, Sec. 8, of the Constitution of the United States which grants exclusive power of legislation over such areas to the Congress of the United States.

5. A Federal employee is not subject to taxation by the Territory of Hawaii on compensation received for personal services performed by him for the United States Government in the absence of specific authority or consent granted either in the Organic Act or by other Act of Congress. Nothing in the [24] Organic Act for the Territory of Hawaii, nor any other act of the Congress of the United States specifically grants unto the Territory such power of taxation.

6. The taxation by the Territory of Hawaii of the compensation of federal employees living on military reservations is not a "rightful subject of legislation" within the meaning of Section 55 of the Organic Act for the Territory of Hawaii.

7. The imposition of a tax on the compensation of Federal employees working and living within areas reserved for military or naval purposes

works an undue burden on the Government of the United States.

8. The provision in the Compensation and Dividends Tax Law exempting members of the Armed Forces on active duty renders said act unconstitutional on the following grounds:

(a) It grants special privileges and immunities to individuals without the same having been approved by Congress, as is required by Sec. 55 of the Organic Act.

(b) It is discriminatory in that it exempts members of the Armed Forces on active duty but does not exempt Federal employees living and working on military or naval reservations or areas reserved for purposes of the Army or Navy of the United States.

9. That said tax law is discriminatory in that it subjects Defendant as a Federal employee to the penalty of fine and imprisonment, to which employees of private persons are not subjected.

10. That said tax law is discriminatory in that it subjects Defendant as a Federal employee to the burden of filing returns while employees of private persons are not so [25] burdened; and in that Defendant's employer (the United States) is not required to make deductions on account of said tax, while employers of private persons are so required.

11. That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th Amendment to the Constitution of the United States in that he is taxed upon

compensation, a portion of which he never actually receives; his gross compensation being first subject to deduction for Federal income withholding taxes.

12. That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and 14th amendments to the Constitution of the United States in that said tax is imposed without regard to whether or not the taxpayer is already so subject to taxation by the state of his domicile.

13. That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and 14th amendments to the Constitution of the United States in that the rate of said tax is discriminatory—salaried persons being subject to a 2 per cent tax, while persons engaged in businesses, professions, or as wholesalers, manufacturers, producers, etc., are subject to a tax at a lesser rate.

14. That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and 14th amendments to the Constitution of the United States in the following respect:

Said tax law is imposed in co-ordination with the income tax law and credit up to 75 per cent paid under said tax law is credited as against the amount due under said Income Tax Law, certain personal exemptions being allowed under said Income Tax Law—but no provision is made for [26] the return to tax-

payer of any monies he may have paid in excess of that due under the Income Tax Law after giving credit for the personal exemptions that are allowed—thus in effect imposing a higher tax rate on the low income bracket taxpayer.

15. That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and 14th amendments to the Constitution of the United States in that said tax is oppressive and carries an unfair share of the entire tax load of the Territory of Hawaii.

16. That said tax law is unconstitutional as applied to the Defendant in that it is an example of “taxation without representation”.

That I ruled against the Defendant on all of said points of law, in overruling the Demurrer filed herein.

An appeal from said judgment has been duly noted by the Defendant to the Supreme Court of the Territory of Hawaii on points of law, and said appeal has been duly perfected.

A full and correct copy of my record in this case is hereto attached.

Given under my hand this 31st day of October, 1947.

/s/ ROBERT M. YATES,

District Magistrate of Ewa, City and County of Honolulu, Territory of Hawaii. [27]

[Title of District Court and Cause.]

Appeal from the District Court of Ewa, County of Honolulu, Territory of Hawaii, on Points of Law.

PRAECIPE

To the Clerk of the above entitled court:

You are hereby directed to prepare and forward to the Supreme Court of the Territory of Hawaii, the following records for appeal in said case.

1. Complaint and Summons.
2. Answer and Disclosure of Garnishees.
3. Demurrer.
4. Agreed Statement of Facts.
5. Judgment.
- 6 Notice of Appeal.
7. Magistrate's Certificate of Appeal.
8. This Praecipe.
9. Clerk's Certificate.
10. Itemized Statement of Costs.

Dated at Honolulu, T. H., this 7th day of November, 1947.

VICTOR J. VEATCH,
Defendant,

By /s/ HYMAN M. GREENSTEIN,
His Attorney. [29]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Thomas Miki, Clerk of the District Court of Ewa, County of Honolulu, Territory of Hawaii, do hereby certify that the foregoing papers and pleadings are the originals in the above entitled cause.

The documents are specifically designated and enumerated as follows:

1. Complaint and Summons
2. Garnishee Summons
3. Answer and Disclosure of Bank of Hawaii
4. Disclosure of Bishop National Bank
5. Demurrer
6. Agreed Statement of Facts and Exhibit "A"
7. Judgment
8. Notice and Certificate of Appeal
9. Magistrate's Certificate of Appeal [30]
10. Praecipe
11. Clerk's Certificate
12. Magistrate's Certificate

Dated at Pearl City, Territory of Hawaii, this 14th day of November, A. D. 1947.

/s/ THOMAS L. MIKI,

Clerk, District Court of Ewa.

[Title of District Court and Cause.]

MAGISTRATE'S CERTIFICATE

I, R. M. Yates, the Presiding Magistrate in the above entitled cause, hereby make a return to the Appeal heretofore perfected by the Defendant on Points of Law and hereby remit to the Supreme Court of the Territory of Hawaii the Record on Appeal.

Dated at Pearl City, T. H., this 14th day of November, A. D. 1947.

/s/ R. M. YATES,

District Magistrate of Ewa.

————— [32]

In the Supreme Court of the Territory of Hawaii,
October Term 1947.

No. 2690

WILLIAM BORTHWICK, Tax Commissioner of
the Territory of Hawaii,

v.

VICTOR J. VEATCH.

Appeal from District Magistrate of Ewa,
Hon. R. M. Yates, Magistrate.

Submitted July 8, 1948.

Decided July 30, 1948.

Kemp, C. J., Peters and Le Baron, JJ.

Taxation—Legislative Power of Territory.

The term “all rightful subjects of legislation,” as employed in section 55 of the Organic Act, is all-

inclusive and no implication arises from the absence of a specific grant of the legislative power to tax.

Same — compensation and dividends tax — effect of residence and employment on military reservation where compensation is earned.

Compensation paid an employee of the United States Army who resides on a military reservation within the geographical limits of the Territory of Hawaii for personal service performed by him on said military reservation is compensation paid for or attributable to personal services “performed within the Territory” within [34] the meaning of the word “compensation” as used in the compensation and dividends tax law. (R.L.H. 1945, c. 98.)

Same—same—compensation assessable.

Payment by an employer of federal income taxes assessable against the compensation of an employee made in consideration of his services constitutes additional taxable compensation of the employee under the compensation and dividends tax law of Hawaii.

Same—constitutional requirements and restrictions—double taxation.

The objection that upon compensation received by the taxpayer for services performed by him within the Territory of Hawaii he is subjected to double taxation, namely, to an income tax under the laws of the State of Colorado, the State of his domicile, and to the compensation and dividends tax under the provisions of Revised Laws of Hawaii 1945, chapter 98, cannot be considered in

the absence of evidence of the terms and provisions of the income tax law of the State of Colorado, pursuant to which the income tax was paid by the taxpayer.

Same—same—discrimination.

No discrimination in a constitutional sense results from the difference between the tax rates in the general excise tax law (R.L.H. 1945, c. 101) and the compensation and dividends tax law nor from the failure of the income tax law (R.L.H. 1945, § 5504) to grant a refund of taxes paid under the compensation and dividends tax law in excess of the exemption of seventy-five per cent nor [35] from the proportion that the compensation and dividends taxes collected bear to the total taxes collected under the tax laws of the Territory. [36]

OPINION OF THE COURT

By KEMP, C. J.

This is an appeal on points of law from a decision and judgment entered against Victor J. Veatch (hereinafter referred to as defendant), in favor of William Borthwick, tax commissioner of the Territory of Hawaii (hereinafter referred to as plaintiff), by the district magistrate of the district of Ewa, City and County of Honolulu, Territory of Hawaii.

The plaintiff instituted the suit in the district court of Ewa alleging that the defendant is in the Ewa district and within the jurisdiction of the above-entitled court and that he is “indebted to the Territory of Hawaii for compensation and divi-

dend taxes, pursuant to Chapter 98 of the Revised Laws of Hawaii 1945, as amended, * * * together with penalties and interest thereon * * *” for the years 1944, 1945 and 1946.

The statute, chapter 98, Revised Laws of Hawaii 1945, which imposes the tax here involved, is entitled “Compensation and Dividends Tax Law” and comprises sections 5341 to 5359 of said Revised Laws, both sections included. Such of its provisions as are pertinent to the issues here involved may be summarized as follows: It imposes a tax of two per cent upon all compensation received by every person with the exception of (1) compensation paid out of funds appropriated for the relief of unemployment, (2) paid out of public welfare funds, (3) paid to employees in the county of Kalawao, (4) paid as a pension for past service, and (5) compensation received from the United States by members of the United States Army, Navy, Marine Corps and Coast Guard on active service. (§ 5344.) Said statute defines [37] “compensation” as including salaries “paid for or attributable to personal services performed within the Territory received by an individual * * *.” (§ 5342.)

The defendant demurred to the complaint alleging sixteen grounds, as follows:

“I.

“The Defendant, being employed at Hickam Field, does not receive compensation for ‘personal services performed within the Territory’ within the meaning of Sec. 5342 R.L.H. 1945, and hence is not subject to the Compensation and Dividends Tax Law.

“II.

“The Territory of Hawaii does not have jurisdiction over the person of federal employees living and working on military reservations to permit it to impose a tax on compensation derived from such employment.

“III.

“The Defendant is a federal employee, living on land reserved for purposes of the United States Army and working on a military reservation, and hence is not subject to the jurisdiction of the Territory of Hawaii in connection with matters arising out of such employment.

“IV.

“The Compensation and Dividends Tax Law as applied to persons working in military establishments is unconstitutional and in violation of Clause 17 of Art. I, Sec. 8, of the Constitution of the United States which grants exclusive power of legislation over such area to the Congress of the United States. [38]

“V.

“A federal employee is not subject to taxation by the Territory of Hawaii on compensation received for personal services performed by him for the United States Government in the absence of specific authority or consent granted either in the Organic Act or by other Act of Congress. Nothing in the Organic Act for the Territory of Hawaii, nor any other act of the Congress of the United States specifically grants unto the Territory such power of taxation.

“VI.

“The taxation by the Territory of Hawaii of the compensation of federal employees living on military reservations is not a ‘rightful subject of legislation’ within the meaning of Section 55 of the Organic Act for the Territory of Hawaii.

“VII.

“The imposition of a tax on the compensation of federal employees working and living within areas reserved for military or naval purposes works an undue burden on the Government of the United States.

“VIII.

“The provision in the Compensation and Dividends Tax Law exempting members of the Armed Forces on active duty renders said act unconstitutional on the following grounds:

“A. It grants special privileges and immunities to individuals without the same having been approved by Congress, as is required by Sec. 55 of the Organic Act.

“B. It is discriminatory in that it exempts members of the Armed Forces on active duty but does not exempt federal employees living and working on military or naval reservations or areas reserved for purposes of the Army or Navy of the United [39] States.

“IX.

“That said tax law is discriminatory in that it subjects Defendant, as a federal employee, to the penalty of fine and imprisonment, to which employees of private persons are not subjected.

“X.

“That said tax law is discriminatory in that it subjects Defendant, as a federal employee, to the burden of filing returns while employees of private persons are not so burdened; and in that Defendant’s employer (the United States) is not required to make deductions on account of said tax, while employers of private persons are so required.

“XI.

“That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th Amendment to the Constitution of the United States in that he is taxed upon compensation, a portion of which he never actually receives; his gross compensation being first subject to deduction for federal income withholding taxes.

“XII.

“That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States in that said tax is imposed without regard to whether or not the taxpayer is already so subject to taxation by the state of his domicile.

“XIII.

“That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and [40] 14th Amendments to the Constitution of the United States in that the rate of said tax is discriminatory—salaried persons being subject to a 2% tax, while persons engaged in businesses, professions, or as wholesalers, manu-

facturers, producers, etc. are subject to a tax at a lesser rate.

“XIV.

“That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States in the following respect:

“Said tax law is imposed in co-ordination with the income tax law and credit up to 75% paid under said tax law is credited as against the amount due under said Income Tax Law, certain personal exemptions being allowed under said Income Tax Law—but no provision is made for the return to taxpayer of any monies he may have paid in excess of that due under the Income Tax Law after giving credit for the personal exemptions that are allowed—thus in effect imposing a higher tax rate on the low income bracket taxpayer.

“XV.

“That under said tax law the Defendant is deprived of property without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States in that said tax is oppressive and carries an unfair share of the entire tax load of the Territory of Hawaii.

“XVI.

“That said tax law is unconstitutional as applied to the Defendant in that it is an example of ‘taxation without representation’.” [41]

The demurrer was overruled and the case was

thereupon submitted upon an agreed statement of facts as follows:

“1. That defendant Victor J. Veatch, is a civilian employee of the United States Army, Hawaiian Air Material Area, working and living at Hickam Field, Oahu, Territory of Hawaii.

“2. That for his services as such employee of the United States Army, defendant received during the periods below stated, the following compensation:

“October to December, 1944.....\$ 601.00

“The year 1945 3,734.50

“January to September, 1946..... 2,414.50

“That defendant admits that the amount of taxes, penalties and interest sought to be recovered, as set forth in Paragraph III of the Complaint are correct, if any taxes are due, but that defendant denies he is subject to said Compensation and Dividends Tax Law.

“3. That the services for which such compensation was received, were performed within Hickam Field, Oahu, Territory of Hawaii.

“4. That said area at Hickam Field, wherein said defendant is employed and lives is a military reservation of the United States.

“5. That defendant is domiciled in and a citizen of the State of Colorado, and owns his own home at 44 Cooper Avenue, Colorado Springs, Colorado, and pays real estate and personal property taxes in connection therewith.

“6. That defendant has returned the compensa-

tion above set forth for taxation under the net income tax law of the State of Colorado and has paid a net income tax thereon without claiming or receiving any credit on account of his tax liabilities, [42] if any, to the Territory of Hawaii.

“7. The major revenues received from taxation by the Territory of Hawaii for the period of time from 1943 to date are as set forth in Exhibit ‘A’ attached hereto and made a part hereof.

“8. That this stipulation is entered into without prejudice to the right of either party to contend that the facts herein stipulated to, or some of them, are irrelevant and immaterial.”

Exhibit “A”, attached to and made a part of the agreed statement of facts, shows that for the 1945-1947 biennium the compensation and dividends tax produced approximately 17.55 million dollars out of a total from all sources of approximately 89.73 million dollars and for the 1943-1945 biennium approximately 14.52 million dollars out of a total from all sources of approximately 79.74 million dollars.

Thereafter judgment was entered against the defendant in accordance with the prayer of the plaintiff.

The defendant duly perfected an appeal to this court on points of law and the magistrate certified the appeal to this court as follows:

“Defendant is a civilian employee of the U. S. Army, living and working at Hickam Field, Oahu, Territory of Hawaii.

“A Demurrer was filed in behalf of the Defen-

dant challenging the constitutionality of the Compensation and Dividends Tax Law as applied to persons working and living in military reservations.

“Said Demurrer was overruled; and the case tried on an [43] Agreed Statement of Facts; which statement admitted the amounts complained of in the Complaint but challenged the applicability of said law to persons working and living on a military reservation.

“The case being submitted on the Agreed Statement of Facts, judgment was entered as hereinabove set forth.

“I further certify that the points of law involved herein are set forth in the Demurrer, in that the constitutionality of the Compensation and Dividends Tax Law is challenged by the Defendant herein on the following grounds: (Here follow the sixteen grounds of the demurrer.)

“That I ruled against the Defendant on all of said points of law, in overruling the Demurrer filed herein.”

We shall first consider defendant's point V because by it he places his reliance upon the fact that nothing in the Organic Act nor any other Act of Congress specifically grants unto the Territory the power or authority to tax the compensation received by a federal employee for personal services performed by him for the United States.

Defendant misconceives the import of section 55 of the Organic Act, which declares that “the legislative power of the Territory shall extend to all

rightful subjects of legislation * * *.” The Congress thereby sought to vest the territorial legislature with “all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress.” *Clinton v. Englebrecht*, 80 U. S. 434, 441. See also *Maynard v. Hill*, 125 U. S. 190, 204, 205; *Cope v. Cope*, 137 U. S. 682, 684, and *Territory v. O’Connor*, 41 N. W. 746, 749, where it is said: [44] “It is too late now for the courts to hold that the territory is other than a temporary sovereign government—temporary, in that its organic laws and its very existence are subject to the paramount will of Congress, its creator; sovereign, in that its executive, legislative, and judicial powers are unlimited except by the terms of the constitution or its organic law. When Congress created the temporary sovereign government of the territory, it intended to confer upon it such legislative powers as are usually exercised by sovereign states.” The Territory of Hawaii is just such a sovereign. (*Kawananakoa v. Polyblank*, 205 U. S. 349, 353.) Unless expressly restricted, the powers conferred include the power to tax. (*W. C. Peacock & Co. v. Pratt*, 121 Fed. 772, 775, a case involving our own Organic Act, where it is said: “The only restriction of the powers of the territorial Legislature contained in the Organic Act is the provision that the ‘legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States

locally applicable.' " See also *In Re Yerian*, 35 Haw. 855, *aff'd*, 130 F. (2d) 786; *Kitagawa v. Shipman*, 31 Haw. 726, *aff'd*, 54 F. (2d) 313; *cert. denied*, 286 U. S. 543; *Com'rs of Silver Bow County v. Davis*, 6 Mont. 306; *Talbott v. Silver Bow County*, 139 U. S. 438, and 1 Cooley, *Taxation* (4th ed.) § 118, where it is said that "The plenary legislative power which Congress possesses over territories may be exercised either by it or may be delegated to the legislature of the territory. Generally it is delegated to the territorial legislature.")

In view of the foregoing, the absence of express grant to the legislature of power to levy a particular character of tax carries no implication against the existence of the power. [45]

The defendant's points I to IV inclusive, and VI and VII, challenge on various grounds the jurisdiction of the Territory to tax the salary of an employee of the Army who resides and works on a United States military reservation. His point I is that the place where he resides and works is not within the Territory. His point II is that the Territory does not have jurisdiction over the person of a federal employee living and working on a military reservation. His point III is that the Territory is without jurisdiction in connection with matters arising out of his employment on a military reservation. His point IV is that the tax law as applied to persons working in military establishments is violative of the provisions of Article I, Section 8, of the Constitution of the United States. His point VI is that taxation by the Terri-

tory of compensation of federal employees living on military reservations is not a rightful subject of legislation within the meaning of Section 55 of the Organic Act, and his point VII is that a tax on compensation of a federal employee working and living within areas reserved for military or naval purposes works an undue burden on the Government of the United States. His principal reliance is on Article I, Section 8, of the Constitution of the United States, which provides, *inter alia*, that "The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall [46] be, for the Erection of Forts, Magazines, Arsenals, Dock-yards, and other needful Buildings;—And

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The defendant admits that Hickam Field is geographically within the territorial limits of the Territory of Hawaii but he contends that the phrase "within the Territory" as used in the Act (R.L.H. 1945, c. 98) means "within the jurisdiction of the Territory." And since, as he contends, the Terri-

tory's jurisdiction does not extend to military reservations, it is without power to tax a salary earned by an employee of the Army who lives and works on a military reservation.

This court long ago and without Congressional consent held that property on a United States military reservation within the Territory owned by an individual is subject to taxation by the Territory. (*Cassels v. Wilder*, 23 Haw. 61.) This court also long ago held that the territorial district courts have jurisdiction of misdemeanors committed on land reserved for naval purposes. (*Territory v. Carter*, 19 Haw. 198.) In 1938 Congress enacted the Public Salary Tax Act (53 Stat. pt. 2, c. 59, § 4, p. 575), whereby the United States consented to the taxing of compensation received by officers and employees of the United States or of any agency or instrumentality thereof, as follows: "Sec. 4. The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession [47] or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation."

Thereafter, on the authority of *Van Allen v. The Assessors*, 70 U. S. 573, 585, and *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, 478, this

court held that the authority of Congress to consent for the United States to taxation of compensation received by officers and employees of the United States or any agency or instrumentality thereof is unquestionable, and that holding was affirmed by the Ninth Circuit Court of Appeals. (In re Yerian, *supra*.) None of the foregoing cases are direct authority on the exact question posed by the points now under consideration, namely, whether or not the Territory is authorized to tax the salary of an employee of the Army who resides and works on a United States military reservation. They are however persuasive. Be that as it may, on October 9, 1940, the Congress recognized the jurisdictional claim of the Territory over areas owned and occupied by the United States, especially for taxation purposes, by enacting Public 819. (54 Stat. c. 787, p. 1059.) Public 819 has been reenacted as part of Title 4 of the United States Code by the Act of July 30, 1947 (61 Stat. c. 389) and is now officially sections 105-110, inclusive, of Title 4 of the United States Code.

The pertinent part of said Act follows: “(a) No person shall be relieved from liability for any income tax levied by any State or by any duly constituted taxing authority therein, having jurisdiction [48] to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State, or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such

State to the same extent and with the same effect as though such area was not a Federal area.

“(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.” (U. S. Code, Tit. 4, §§ 106a, 106b.)

Said Act defines the term “State” as including any Territory or possession of the United States and the term “income tax” as a tax levied on, with respect to, or measured by, net income, gross income, or gross receipts. (U. S. Code, Tit. 4, § 110.)

It seems clear that the above Act was expressly designed to express the consent of the United States to the levy by the States and Territories of just such a tax as the one here involved against persons residing and employed just as the defendant resides and is employed, and that the Congress had authority to so consent for the United States.

Defendant’s point VIII is that the provision of the Act exempting members of the armed forces on active duty from the tax renders said Act unconstitutional in that (a) it grants special privileges and immunities to individuals without approval of Congress, and (b) that it is discriminatory in that it does not also exempt federal employees living and working on military or naval reservations. His point IX is that said Act [49] is discriminatory in that it subjects him as a federal employee to the penalty of fine and imprisonment, to which employees of private persons are

not subjected, and his point X is that said Act is discriminatory in that it subjects him as a federal employee to the burden of filing returns while employees of private persons are not so burdened.

All of said points VIII, IX and X were considered and rejected by this court and by the Ninth Circuit Court of Appeals in the Yerian case, *supra*. The only factual difference between this case and the Yerian case is that the defendant in this case lives and works on a military reservation, whereas Yerian did not. We have already rejected the defendant's claim as to the effect of the fact that he resides and works on a military reservation. We conclude that there is no merit in any one of the defendant's points VIII, IX and X.

Defendant's point XI is that because the United States taxed his compensation and withheld its tax, he never actually received that part of his compensation and that for the Territory to tax his compensation without deducting the amount thereof withheld by the United States deprives him of property without due process of law.

By Paragraph 2 of the agreed statement of facts, upon which the case was tried in the district court, the defendant has admitted that the amount of taxes, penalties and interest sought to be recovered as set forth in the complaint are correct if any taxes are due. His point IX does not therefore involve a point of law ruled upon by the district magistrate and is not therefore properly before us on this appeal.

However, we choose to consider defendant's ar-

gument, but [50] in doing so we need do no more than refer to *Old Colony Tr. Co. v. Comm'r Int. Rev.*, 279 U. S. 716, 729, in which it was held that where the taxpayer acquiesced in the payment of his taxes by his employer it is "immaterial that the taxes were directly paid over to the Government," and that the tax paid by the employer for the employee was income of the employee.

By his point XII defendant claims exemption from the tax because his permanent domicile is elsewhere than Hawaii. He argues that he is deprived of property without due process of law in that said tax is imposed without regard to whether or not the taxpayer is already so subject to taxation by the State of his domicile. His point XVI is that the tax as applied to him is an example of "taxation without representation." The substance of the agreed statement of facts on these points is that the defendant is domiciled in and is a citizen of the State of Colorado; that he owns a home in said State and pays real and personal property taxes in said State; that he has returned the compensation herein sought to be taxed for taxation under the net income tax law of the State of Colorado and has paid a net income tax thereon without claiming or receiving any credit on account of his tax liabilities, if any, in the Territory of Hawaii. The income tax law of the State of Colorado is not made a part of the agreed statement of facts. We do not know whether or not under its terms the defendant was required to pay an income tax upon the compensation received by him

for personal services performed within the Territory of Hawaii. As far as we know, his inclusion of his Hawaii salary was voluntary and that he was not under any such liability.

Defendant cites no authority in support of his argument [51] on either of these points, and plaintiff rests its case thereon by citing *In re Yerian*, supra. In the *Yerian* case the tax in question had been imposed upon compensation received by the taxpayer for personal services performed by him within the Territory. No compensation for personal services performed by the taxpayer elsewhere was involved but enough was said in that case to support the conclusion that the tax was inapplicable to compensation earned by the taxpayer elsewhere than in Hawaii. So that if the provisions of the income tax law of the State of Colorado are similar in terms to our tax law compensation for personal services performed in Hawaii would not be subject to taxation in Colorado and payment of a tax thereon to the State of Colorado would be a voluntary act of the taxpayer and would have no effect upon his liability to Hawaii for the tax in question. The mere fact that the taxpayer in the instant case paid an income tax to the State of Colorado upon compensation received by him and subject to taxation under the laws of Hawaii is not evidence that the taxpayer was legally liable for the payment of such income tax under the laws of the State of Colorado. The voluntary payment of taxes for which a taxpayer is not liable does not make the payment of taxes for which he is liable

double taxation. (*The People v. Calloway*, 344 Ill. 488, 176 N. E. 912.)

Defendant's points XIII, XIV and XV may be considered together. His point XIII is that he is deprived of property without due process of law, in that said tax is discriminatory—salaried persons being subject to a two per cent tax, while persons engaged in business and the professions [52] are subject to a tax at a lesser rate.

His point XIV is that he is deprived of property without due process of law, in that no provision is made for refunding to the taxpayer the excess over the amount due under the net income tax law paid on account of the two per cent tax on salaries, and is arbitrary, discriminatory and confiscatory.

His point XV is that he is deprived of property without due process of law, in that said tax is oppressive and carries an unfair share of the entire tax load of the Territory.

Defendant's argument that the two per cent tax on compensation, imposed by chapter 98, Revised Laws of Hawaii 1945, is discriminatory because those in business and the professions are subject to a lower rate under the excise tax law, chapter 101, Revised Laws of Hawaii 1945, is not tenable. He fails to point out that those in business and the professions are additionally subject to the net income tax imposed by chapter 102, Revised Laws of Hawaii 1945, without any credit for the gross income tax paid under chapter 101, while employees do receive credit against their net income tax liability under chapter 102, to the extent of

seventy-five per cent of the tax paid under chapter 98. (§ 5504, R.L.H. 1945.)

The foregoing also answers defendant's point XIV and rejects his argument thereon.

The sustaining of the objection that the defendant voices by his assertion in his point XV that an unfair share of the tax revenues of the Territory is derived from the two per cent tax on wages, salaries and dividends would unduly restrict the classification of objects for taxation purposes.

To tax wages and salaries in one class and business and [53] professions in another is reasonable classification. (*Dole v. Philadelphia et al.*, 337 Pa. 375, 11 A. (2d) 163.) That being so, different rates of tax may be imposed; this is a commonplace of taxation and constitutional law. (*Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362, 368, 369.)

The judgment is affirmed.

/s/ S. B. KEMP,

/s/ E. C. PETERS,

/s/ LOUIS LE BARON. [54]

H. M. Greenstein for defendant-appellant.

R. V. Lewis, Assistant Attorney General (W. D. Ackerman, Jr., Attorney General, with her on the brief) for plaintiff-appellee.

[Endorsed]: Filed July 20, 1948.

In the Supreme Court of the Territory of Hawaii
No. 2690

WILLIAM BORTHWICK, Tax Commissioner of
the Territory of Hawaii,

Appellee,

vs.

VICTOR J. VEATCH,

Appellant,

BANK OF HAWAII, Pearl Harbor Branch, and
the BISHOP FIRST NATIONAL BANK OF
HAWAII, Hickam Branch, Garnishees.

Appeal from the District Court of Ewa, County of
Honolulu, Territory of Hawaii, on
Points of Law.

DECISION ON APPEAL

In the above-entitled cause, pursuant to the
opinion of the above-entitled court rendered and
filed on July 30, 1948, the judgment of the lower
court is affirmed.

Dated at Honolulu, T. H., August 24, 1948.

By the Court:

(Seal) /s/ LEOTI V. KRONE,
Clerk.

Approved:

/s/ S. B. KEMP,
Chief Justice.

[Title of Supreme Court and Cause.]

PETITION FOR APPEAL

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

Comes now Victor J. Veatch, Appellant above named, by his attorney Hyman M. Greenstein, deeming himself aggrieved by the judgment of the above entitled Court in the above entitled cause, which judgment was made and entered on August 24, 1948, and claiming that there are manifest and material errors to the damage of said Victor J. Veatch, in said cause, which errors are specifically set forth in the Assignment of Errors filed herewith, to which reference is hereby made, and respectfully prays that an appeal may be allowed in the above entitled cause and that he be allowed to prosecute said appeal to the United States Circuit Court of Appeals for [58] the Ninth Circuit, in accordance with the statutes in such cases made and provided; and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record, proceedings and papers in this cause, duly authenticated, for the correction of the errors complained of, and that a citation may issue.

And in this behalf, the said Victor J. Veatch, shows that said judgment was rendered on an appeal on points of law from the District Court of

Ewa, County of Honolulu, Territory of Hawaii, in the above entitled Court and cause, and involves the Constitution and laws of the United States of America.

Dated at Honolulu, T. H., this 24th day of August, 1948.

/s/ HYMAN M. GREENSTEIN,
Attorney for Victor J. Veatch,
Appellant. [59]

(Duly Verified.)

(Acknowledgment of Service.

[Endorsed]: Filed Aug. 24, 1948. [60]

[Title of Supreme Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the above named Victor J. Veatch, Appellant in the above entitled cause and files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioned for in the said cause of the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 24th day of August, 1948.

1. The Supreme Court erred in affirming the judgment of the District Court of Ewa, County of Honolulu, Territory of Hawaii, and in failing to set aside and vacate the judgment of said District Court.

2. The Supreme Court erred in failing to rule that the Appellant being employed at Hickam Field, does [62] not receive compensation for "personal services performed within the Territory" within the meaning of Sec. 5342 R.L.H. 1945, and hence is not subject to the Compensation and Dividends Tax Law.

3. The Supreme Court erred in failing to rule that the Territory of Hawaii does not have jurisdiction over the person of federal employees living and working on military reservations to permit it to impose a tax on compensation derived from such employment.

4. The Supreme Court erred in failing to rule that the appellant is a federal employee, living on land reserved for purposes of the United States Army and working on a military reservation, and hence is not subject to the jurisdiction of the Territory of Hawaii in connection with matters arising out of such employment.

5. The Supreme Court erred in failing to rule that the Compensation and Dividends Tax Law as applied to persons working in military establishments is unconstitutional and in violation of Clause 17 of Art. I, Sec. 8, of the Constitution of the United States which grants exclusive power of legislation over such areas to the Congress of the United States.

6. The Supreme Court erred in failing to rule that a federal employee is not subject to taxation by the Territory of Hawaii on compensation received for personal services performed by him for

the United States Government in the absence of specific authority or consent granted either in the Organic Act or by other act of Congress. Nothing in the Organic Act for the Territory of Hawaii, nor [63] any other act of the Congress of the United States specifically grants unto the Territory such power of taxation.

7. The Supreme Court erred in failing to rule that the taxation by the Territory of Hawaii of the compensation of federal employees living on military reservations is not a “rightful subject of legislation” within the meaning of Section 55 of the Organic Act for the Territory of Hawaii.

8. The Supreme Court erred in failing to rule that the imposition of a tax on the compensation of federal employees living within areas reserved for military or naval purposes works an undue burden on the Government of the United States.

9. The Supreme Court erred in failing to rule that the provision in the Compensation and Dividends Tax Law exempting members of the Armed Forces on active duty renders said act unconstitutional on the following grounds:

(a) It grants special privileges and immunities to individuals without the same having been approved by Congress, as is required by Sec. 55 of the Organic Act.

(b) It is discriminatory in that it exempts members of the Armed Forces on active duty but does not exempt federal employees living and working on military or naval reservations or areas reserved for the purposes of the Army or Navy of the United States.

10. The Supreme Court erred in failing to rule that said tax law is discriminatory in that it subjects Appellant, as a federal employee, to the penalty of fine [64] and imprisonment, to which employees of private persons are not subjected.

11. The Supreme Court erred in failing to rule that said tax law is discriminatory in that it subjects Appellant, as a federal employee, to the burden of filing returns while employees of private persons are not so burdened; and in that Appellant's employer (the United States) is not required to make deductions on account of said tax, while employers of private persons are so required.

12. The Supreme Court erred in failing to rule that under said tax law the Appellant is deprived of property without due process of law in violation of the 5th Amendment to the Constitution of the United States in that he is taxed upon compensation, a portion of which he never actually receives; his gross compensation being first subject to deduction for federal income withholding taxes.

13. The Supreme Court erred in failing to rule that under said tax law the Appellant is deprived of property without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States in that said tax is imposed without regard to whether or not the taxpayer is already so subject to taxation by the state of his domicile.

14. The Supreme Court erred in failing to rule that under said tax law the Appellant is deprived of property without due process of law in violation

of the 5th and 14th Amendments to the Constitution of the United [65] States in that the rate of said tax is discriminatory—salaried persons being subject to a two per cent tax, while persons engaged in businesses, professions, or as wholesalers, manufacturers, producers, etc., are subject to a tax at a lesser rate.

15. The Supreme Court erred in failing to rule that under said tax law the Appellant is deprived of property without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States in the following respect:

Said tax law is imposed in co-ordination with the income tax law and credit up to 75% paid under said Tax Law is credited as against the amount due under said Income Tax Law, certain personal exemptions being allowed under said Income Tax Law—but no provision is made for the return to taxpayer of any monies he may have paid in excess of that due under the Income Tax Law after giving credit for the personal exemptions that are allowed—thus in effect imposing a higher tax rate on the low income bracket taxpayer.

16. The Supreme Court erred in failing to rule that under said tax law the Appellant is deprived of property without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States in that said tax is oppressive and carries an unfair share of the entire tax load of the Territory of Hawaii.

17. The Supreme Court erred in failing to rule that said tax law is unconstitutional as applied to the Appellant in that it is an example of "taxation without representation". [66]

Wherefore, Victor J. Veatch, prays that the said judgment of the Supreme Court of the Territory of Hawaii may be reversed, and for such other and further relief as to the Court may seem just and proper.

Dated at Honolulu, T. H., this 24th day of August, 1948.

/s/ HYMAN M. GREENSTEIN,
Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 24, 1948. [67]

[Title of Supreme Court and Cause.]

ORDER ALLOWING APPEAL AND
FIXING AMOUNT OF BOND

Upon reading and filing the verified Petition for Appeal presented to this Court by Victor J. Veatch, in which he prays that an appeal may be allowed him to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment of this Court made and entered in the above entitled Court and cause on August 24, 1948, wherein it is alleged that manifest and material errors have occurred, to the end that said errors, if any there be, may be speedily corrected and justice done in

the premises; and upon said Victor J. Veatch, filing an Assignment of Errors, together with said Petition for Appeal, and together with a bond for costs in the sum of Two Hundred Fifty Dollars (\$250);

It Is Hereby Ordered that said appeal to the [69] United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby allowed, and that said bond for costs in the amount of Two Hundred Fifty Dollars (\$250), filed by said Victor J. Veatch, be and it is hereby approved.

Dated at Honolulu, T. H., this 24th day of August, 1948.

/s/ S. B. KEMP,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Attest:

(Seal) /s/ LEOTI V. KRONE,
Clerk.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 24, 1948. [70]

[Title of Supreme Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That Victor J. Veatch, as principal and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of

Maryland, as surety, are held and firmly bound unto William Borthwick, Tax Commissioner of the Territory of Hawaii, Appellee, in the sum of \$250 for the payment of which well and truly to be made, said Victor J. Veatch as principal and United States Fidelity and Guaranty Company, as surety, do bind themselves, their respective heirs, executors, administrators, successors and assigns, jointly and severally, and firmly by these presents.

The condition of this obligation is such that:

Whereas the above bounden principal, Victor J. Veatch, has filed his Petition for an Appeal to the [72] United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered in the above entitled cause by the Supreme Court of the Territory of Hawaii;

Now, Therefore, if the said principal shall prosecute said appeal with effect and answer all costs if he fails to sustain said appeal, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof, said Victor J. Veatch has hereunto set his hand, this 23rd day of August, 1948.

/s/ VICTOR J. VEATCH,
Principal.

(Seal) UNITED STATES FIDELITY AND
GUARANTY COMPANY.

By /s/ CALVERT G. CHIPCHASE,
Surety.
Its Attorney-in-Fact.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 23rd day of August, 1948, before me personally appeared Victor J. Veatch, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

(Seal) /s/ ROSE I. PAVAO,
Notary Public, First Judicial Circuit, Territory
of Hawaii.

My Commission expires January 22, 1951.

Approved:

/s/ S. B. KEMP,
Chief Justice.

Approved:

/s/ JOHN F. DYER,
Deputy Attorney General.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 24th day of August, 1948, before me personally appeared Calvert G. Chipchase, to me personally known, who being by me duly sworn did say that he is the Attorney-in-Fact of the United States Fidelity and Guaranty Company, duly appointed under Power of Attorney dated the 29th day of January, 1948, which Power of Attorney is now in full force and effect, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was

signed and sealed on behalf of said corporation under the authority of its Board of Directors, and said Calvert G. Chipchase acknowledged said instrument to be the free act and deed of said corporation.

(Seal) /s/ WILLIAM B. STEVEN,
Notary Public, First Judicial Circuit, Territory
of Hawaii.

My Commission expires May 6, 1952.

[Endorsed]: Filed Aug. 24, 1948.

[73]

[Title of Supreme Court and Cause.]

CITATION ON APPEAL

The United States of **America**:

The President of the United States of America to
William Borthwick, Tax Commissioner of the
Territory of Hawaii, and to the Attorney Gen-
eral of the Territory of Hawaii, his attorney,
Greeting:

You, and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, within forty (40) days from the date of this citation, pursuant to an appeal duly allowed and filed in the Office of the Clerk of the Supreme Court of the Territory of Hawaii on

August 24th, 1948, in said cause, wherein Victor J. Veatch is appellant, and you are appellee, to show cause, if any there be, why [75] the judgment made and entered in the Supreme Court of the Territory of Hawaii on August 24, 1948, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Fred M. Vinson, Chief Justice of the United States of America, this 24th day of August, 1948.

/s/ S. B. KEMP,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Attest:

(Seal) /s/ LEOTI V. KRONE,
Clerk.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 24, 1948. [76]

[Title of Supreme Court and Cause.]

PRAECIPE

To: Leoti V. Krone, Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of the record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit

Court of Appeals for the Ninth Circuit, and include in said transcript the following, which are on file in said cause, to-wit:

1. Complaint and Summons.
2. Demurrer.
3. Agreed Statement of Facts.
4. Judgment of District Court of Ewa, County of Honolulu, Territory of Hawaii.
5. Notice of Appeal.
6. Magistrate's Certificate of Appeal.
7. Opinion of the Supreme Court, Territory of Hawaii, filed July 30, 1948. [78]
8. Decision on Appeal (Judgment) of Supreme Court, Territory of Hawaii, filed August 24, 1948.
9. Petition for Appeal.
10. Assignment of Errors.
11. Order Allowing Appeal and Fixing Amount of Bond.
12. Cost Bond on Appeal.
13. Citation on Appeal.
14. Any orders enlarging time to docket cause in the Ninth Circuit Court of Appeals.
15. This Praecipe.

Dated at Honolulu, T. H., this 24th day of August, 1948.

/s/ HYMAN M. GREENSTEIN,
Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 24, 1948.

[79]

[Title of Supreme Court and Cause.]

SUPREME COURT CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing documents listed in the index hereto attached are full, true and correct copies of the certified copies and of the original on file in the above-entitled court and cause.

I Further Certify that the cost of the foregoing transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit is \$90, and that said amount has been paid by the attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, this 4th day of September, 1948.

/s/ LEOTI V. KRONE,
Clerk.

[80]

[Endorsed]: No. 12036. United States Court of Appeals for the Ninth Circuit. Victor J. Veatch, Appellant, vs. William Borthwick, Tax Commissioner of the Territory of Hawaii, Appellee. Transcript of Record. Upon Appeal from the Supreme Court for the Territory of Hawaii.

Filed September 13, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 12036

VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK, Tax Commissioner of
the Territory of Hawaii,

Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS OF RECORD TO BE
PRINTED

Comes now Victor J. Veatch, Appellant herein, by and through his attorney, Hyman M. Greenstein, and in compliance with Subdivision 6 of Rule 19 requiring a concise statement of the points on which Appellant intends to rely on the appeal,

hereby adopts as the points on appeal the Assignment of Errors appearing in the transcript of the record, and, in compliance with the rules of this Court pertaining to the designation of the portion of the record to be printed, directs that the entire Record on Appeal, as set forth in the Praeipie heretofore filed with the Clerk of the Supreme Court of the Territory of Hawaii with the request that copies of the record as so designated be prepared and transmitted to this Court, be printed as the record on review.

Dated at Honolulu, T. H., this 30th day of August, 1948.

/s/ HYMAN M. GREENSTEIN,
Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]:Filed September 18, 1948. Paul P. O'Brien, Clerk.



No. 12036

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK, Tax Com-
missioner of the Territory of Hawaii,

Appellee.

APPELLANT'S BRIEF

Upon Appeal from the Supreme Court for the
Territory of Hawaii.

HYMAN M. GREENSTEIN

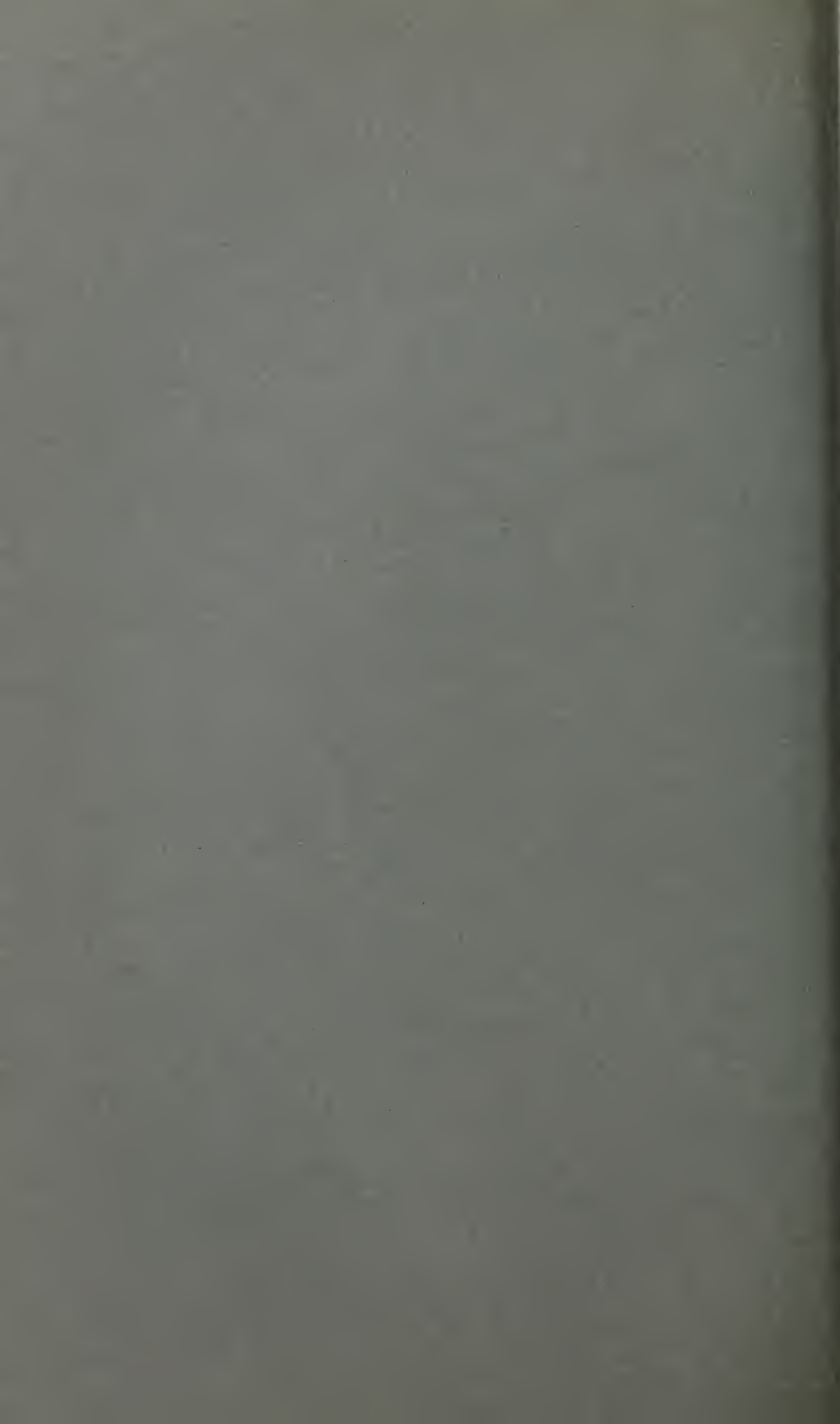
Attorney at Law
Merchandise Mart Building
Honolulu, Hawaii

Attorney for Appellant.

FILED

DEC 16 1948

PAUL P. O'BRIEN,
CLERK



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No. 12036

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii,

Appellee.

APPELLANT'S BRIEF

Upon Appeal from the Supreme Court for the
Territory of Hawaii.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the Supreme Court of the Territory of Hawaii affirming the judgment of the District Court of Ewa, County of Honolulu, Territory of Hawaii, in which the constitutionality and applicability of the Territory's Com-

pensation and Dividends Tax Law as applied to federal employees living and working on military reservations of the United States in the class of appellant, is challenged.

It is respectfully submitted at the very outset that the facts of the instant appeal are sufficiently different from the *Yerian* case decided by this Court (130 F. 2d 786) as to warrant independent and careful consideration.

The jurisdiction of this Court to review said judgment of the Supreme Court of the Territory of Hawaii is sustained by Section 1293 of the new Judicial Code; this case being one in which "the Constitution, laws or treaties of the United States or any authority exercised thereunder" is involved.

STATEMENT OF THE CASE

Appellant is a civilian employee of the United States Army, working and living on Hickam Field, Oahu, Territory of Hawaii, a military reservation of the United States. (Agreed Statement of Facts, points 1 and 4, T-12.)

He is a citizen of, and domiciled in, the State of Colorado, and has paid taxes to the State of Colorado, on the same income sought to be taxed herein by the Territory of Hawaii. (Agreed Statement of Facts, points 2 and 5, T-12, 13.)

Civil suit was brought in the District Court of

Ewa, County of Honolulu, Territory of Hawaii, by the Tax Commissioner of the Territory of Hawaii, against appellant, for taxes claimed to be due and owing by virtue of the Compensation and Dividends Tax Law of the Territory of Hawaii. (Chapter 98, Revised Laws of Hawaii, 1945.) (T-15-17.)

A demurrer was filed in behalf of appellant challenging the applicability of said tax law to appellant and setting forth 16 points of objection. Said demurrer was overruled and the case submitted on an agreed statement of facts. (T-17-22.) Judgment was entered against appellant and the case appealed on points of law to the Supreme Court of the Territory of Hawaii. (T-15-17, 25.)

The judgment of the lower court was affirmed by the Supreme Court of the Territory of Hawaii. (T-47.)

Appeal was duly perfected to this Court.

While appellant in the lower courts saw fit to urge 16 points wherein the applicability of said tax law as applied to him was challenged, appellant herein elects to stand on only one of those objections, and for purposes of squarely raising the one issue that is involved herein the problem can be reduced to but one question: Does the Territory of Hawaii have jurisdiction or power to tax persons in the class of appellant? Only such points as were urged below having relevancy to this question will be argued herein.

SPECIFICATION OF ERRORS RELIED UPON

1. The Supreme Court of the Territory of Hawaii erred in affirming the judgment of the District Court of Ewa, County of Honolulu, Territory of Hawaii, and in failing to set aside and vacate the judgment of said district court. (Assignment of Errors No. 1, T-49, 50.)

2. The Supreme Court of the Territory of Hawaii erred in failing to rule that the appellant is a federal employee, living on land reserved for purposes of the United States Army and working on a military reservation, and hence is not subject to the jurisdiction of the Territory of Hawaii in connection with matters arising out of such employment. (Assignment of Errors No. 4, T-50.)

(a) The Supreme Court erred in failing to rule that a federal employee is not subject to taxation by the Territory of Hawaii on compensation received for personal services performed by him for the United States Government in the absence of specific authority or consent granted either in the Organic Act or by other act of Congress. Nothing in the Organic Act for the Territory of Hawaii, nor any other act of the Congress of the United States specifically grants unto the Territory of Hawaii such power of taxation. (Assignment of Errors No. 6, T-50, 51.)

(b) The Supreme Court erred in failing to rule that under said tax law the Appellant is deprived of property without due process of

law in violation of the 5th and 14th Amendments to the Constitution of the United States in that said tax is imposed without regard to whether or not the taxpayer is already so subject to taxation by the state of his domicile. (Assignment of Errors No. 13, T-52.)

SUMMARY OF ARGUMENT

For purposes of simplicity, the specifications of error relied upon hereinabove, can be reduced to but one contention:

THE TERRITORY OF HAWAII DOES NOT HAVE POWER TO TAX AN EMPLOYEE OF THE UNITED STATES ARMY LIVING AND WORKING ON A MILITARY RESERVATION OF THE UNITED STATES WHERE IN POINT OF FACT SAID EMPLOYEE IS A CITIZEN OF AND DOMICILED IN ANOTHER STATE.

Appellant's argument will be set forth, therefore, as if there is only one specification of error to be relied upon.

ARGUMENT

THE TERRITORY OF HAWAII DOES NOT HAVE POWER TO TAX AN EMPLOYEE OF THE UNITED STATES ARMY LIVING AND WORKING ON A MILITARY RESERVATION

OF THE UNITED STATES WHERE IN POINT
OF FACT SAID EMPLOYEE IS A CITIZEN OF
AND DOMICILED IN ANOTHER STATE.

That the Territory of Hawaii does have a general power of taxation by virtue of Section 55 of the Organic Act to Provide a Government for the Territory of Hawaii, 48 U.S.C.A., Sec. 562, is not a matter of question in this argument; but it is axiomatic that:

“The taxing power of a state is limited to persons and property within and subject to its jurisdiction.”

37 Cyc. 718

Nor is the question being posed as to whether or not congressional consent to the taxation of federal employees if the taxing authority had the “*jurisdiction to tax such compensation*” was given by the Public Salary Tax Act, 5 U.S.C.A., Sec. 84a, as follows:

“The United States hereby consents to the taxation of compensation received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority *having jurisdiction to tax such compensation*, if such taxation does not discriminate against such officer or employee because of the source of such compensation.” (Italics added.)

That was ruled upon in the case *Yerian v Territory of Hawaii*, 130 F. 2d 786. It is therefore to be presumed that the Territory of Hawaii does have certain powers to tax and has power to tax federal employees, if the Territory *otherwise* has jurisdiction to tax such persons, but it is respectfully submitted that the Territory of Hawaii does not have the power to tax federal employees, living and working on military reservations, who do not otherwise come under its jurisdiction.

In Senate Report No. 112, 76th Cong. 1st. Sess., p. 11, it was clearly set forth that the real purpose of the Public Salary Tax Act was to "facilitate the reciprocal taxation as between State and Federal Governments."

"Under this provision, if any local governmental units have authority to and do impose income taxes, tax may be imposed *upon such compensation subject to the jurisdiction of such units.*" (Italics added.)

The report continues:

"The consent is not intended to operate, nor could it operate, as a consent to any taxation to which as individuals these officers and employees are entitled to object whether under the provisions of the Federal Constitution or of the Constitution or statutes of the respective states.

"For example, the consent has no effect upon the rights of an officer of the federal government to object . . . thus he may urge that a particular tax is invalid as to him because of an unreason-

able classification or the lack of . . . jurisdiction to tax, or for other reasons.” (Op. cit. P. 12.) (Italics added.)

Moreover, it is urged that Public Law 819 (54 Stat. 1059, 4 U.S.C.A., Sec. 14) and reenacted by Public Law 279, (61 Stat. 641, 4 U.S.C.A., Sec. 106) does not extend any jurisdiction over the person of a federal employee not otherwise subject to such jurisdiction simply by force of its provisions:

“No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any federal area within such state to the same extent and with the same effect as though such area was not a Federal area.”

As is pointed out in Senate Report No. 659, 80th Cong., p. 9, Sec. 108 of the Act must be taken into consideration:

“The provisions of Sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area.”

And so — it is respectfully submitted that insofar as this particular appellant (and persons similarly situated) is concerned there is still one question to be answered. Does the Territory of Hawaii have jurisdiction over him, and if not — can it pass a tax law effective as against him?

The principal case which seems to have been brought to the attention of the Supreme Court of the United States, apparently analagous to the case at bar, is *Kiker v City of Philadelphia*, 31 A. 2d 289, 346 Pa. 624, which was denied certiorari to the Supreme Court of the United States, 320 U.S. 741, 64 S. Ct. 41, 88 L. Ed. 439. As the background for this denial of certiorari is not given, it might reasonably be concluded that it might have been based upon any one of a number of other points and not necessarily the point at issue here. It is sufficient to note that the precise question that is raised here has not been treated by the Supreme Court of the United States, although the adjudication involves the interpretation of federal statutes and involves the relationship of a federal and state (territorial) and interstate jurisdictional question.

It is our belief, and on that point it is respectfully urged that the dissenting opinion by Mr. Chief Justice Maxey in *Kiker v Philadelphia* (supra) represents the more nearly correct view, and that the matter should be re-considered and the final point of jurisdiction made clear.

But even the majority opinion of the *Kiker* case is not necessarily in bar of appellant's position. It

reaches its conclusion by a line of reasoning not possible in the instant case and places an emphasis upon our dual system of government, by virtue of which the national government cannot run roughshod over the state governments. In the case of a territory, there is no inherent sovereignty to respect. Sovereignty over the entire territory is already established in the federal government and the federal government alone.

When the Republic of Hawaii ceded all rights of sovereignty to the United States upon annexation as a territory (Joint Resolution No. 55, 55th Cong., 2nd Sess., 30 Stat. 750) and subsequently thereto the United States acquired portions of such areas as military reservations, the argument for exclusive jurisdiction over said areas became even stronger than that which obtains where land is acquired by purchase from a state. For in the latter instance a state has a right to bargain with the United States relative to which rights it might desire to retain, while in the former instance the entire area is under jurisdiction of the United States, and remains so until *specific* congressional action dictates otherwise.

Even in the case of *Rivera v Buscaglia*, 146 F. 2d 461, which upheld the Puerto Rican legislature taxing the compensation of federal employees, it was said:

“It may be conceded that the power of a dependency to tax its sovereign will not readily be implied, and that the grant by Congress to the legislature of Puerto Rico of a general power to

tax should not be construed as consent to the imposition of taxes on the United States itself or any of its agencies or instrumentalities.”

(p. 463.)

And in the case of *Fort Leavenworth R.R. v Lowe*, 114 U.S. 525, 526, 5 S. Ct. 995, 29 L. Ed. 264, it was said:

“The land constituting the reservation was part of the territory acquired in 1803 by cession from France, and, until the formation of the State of Kansas, and her admission into the Union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States for military purposes, and occupied by them as a military post. *The jurisdiction of the United States over it during this time was necessarily paramount.*” (Italics added.)

Jurisdiction is “coextensive with authority and sovereignty.”

United States v Motohara, 4 U.S. Dist. Ct. Hawaii, 62, 65.

Admitting then the sovereignty of the United States over duly organized territories, such as the Territory of Hawaii, it must follow that as soon as the federal government uses any land within such territory for military reservations, then *ipso facto* the territory is ousted of jurisdiction over such areas, in

the absence of specific congressional action to the contrary.

It is noteworthy in this connection to recall the case of *Lowe v Lowe*, 133 A. 729, 150 Md. 592, 46 A.L.R. 983, 988, wherein the status of civilian employees living on military reservations has been ably set forth:

“The great weight of authority is to the effect that lands acquired in accordance with the provisions of the Federal Constitution cease to be a part of the state, and become Federal territory, over which the Federal government has complete and exclusive jurisdiction and power of legislation. It is therefore clear that persons residing at Perry point are not residents of the state of Maryland . . . for taxation purposes, . . . for the reason that they reside upon territory belonging to the United States and not the state of Maryland; and in our opinion, for the same reason, they are not such residents of the state as would entitle them to file a bill for divorce in any of the courts of the state. It might be said that it is an unfortunate situation, where by reason of the fact that the Federal government has failed to make provision for such cases, residents upon such reservations are left without any remedy; but it is a condition wherein the only relief which can be given is by the Federal Congress.”

This doctrine has been followed in the Territory of Hawaii, relying on *West v West*, 35 Haw. 461, in which it was ruled that military personnel living off their reservations could establish domicile for pur-

poses of divorce, upon proof of proper intention to form a new domicile and, by analogy, that persons living on military reservations could not establish residence for the basis of divorce unless they had already become subject to the jurisdiction of the Territory. Quoting from this case:

“At no time since his arrival in Honolulu has he resided either on a ship or upon the naval reservation. On the contrary, he has continuously resided off the naval reservation, in rented property in Honolulu, and at the time of the hearing in this case he was residing at the address given in his changed service record. *He has never paid a poll tax or other tax here or elsewhere.* (Italics added.) He has never registered or attempted to register as a voter here and testified that he has never voted anywhere. . . . He further testified that when he left Boston to re-enlist, he had a fixed intention of abandoning any other home he had for the purpose of making Hawaii his home and permanent domicile, and has kept that intention ever since. . . .

(p. 463, 464.)

“We think that both reason and authority support the following conclusions: (1) That an officer or enlisted man, when permitted to establish a home outside of his military or naval station, may thus acquire a domicile but cannot acquire a domicile when required to reside in quarters furnished by the government on a military or naval station; . . .”

(p. 472.)

Similarly it has been held that civilians residing on military reservations are subject to the same regulations. This is substantially the doctrine of *Lowe v Lowe*, supra, which states again on p. 989,

“... They (persons residing on government reservations) are not subject to jury duty; neither can they be taxed for the maintenance of the state government, including the courts . . .”

This doctrine is not opposed in any respect to that set forth in *Fort Leavenworth R.R. Co. v Lowe*, 114 U.S. 525, 532, 533, which states:

“When the title is acquired by purchase by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the constitution that congress shall have ‘like authority’ over such places as it has over the district which is the seat of government; that is, the power of ‘exclusive legislation in all cases whatsoever.’ Broader or clearer language could not be used to exclude all other authority than that of congress; and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals, and of attorneys general.”

It has been shown supra that Congress did not intend that persons living on military reservations could be taxed without the right of objection. It is reiterated here again that the right of taxation is only extended when the state could establish jurisdiction, and as was said before, a Territory has an

even greater burden of proof than a state. It is therefore respectfully submitted that notwithstanding Public Law 819, the doctrine expressed in *Lowe v Lowe*, *supra*, is still applicable.

It is further respectfully submitted that notwithstanding the Public Salary Tax Act, Public Law 819, the *Yerian*,¹ *Graves*,² *Shaffer*³ and similar cases, the responsibility still remains on the Territory of Hawaii to establish that it has jurisdiction over the appellant before its tax laws can be imposed upon him.

It is important also that Public Law 819 is not a positive law creating new power. It merely serves to remove certain restrictions relative to the taxation of salaries of persons residing on military reservations by taxing authorities who can establish jurisdiction over the person sought to be taxed.

The taxing power of a Territory might be considered to be comparable to that of a state — but only insofar as persons domiciled in that Territory are concerned.

In the case at bar we have a person in the employ of the United States Army, living and working in an area specifically set aside for the exclusive use of the United States Army. In such a case, it is respectfully submitted that we have the relationship of dependent to sovereign, and that a general grant of taxation will not suffice to confer jurisdiction to tax persons

¹ *supra*.

² *Graves v People of New York ex rel O'Keefe*, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927, 120 A.L.R. 1466.

³ *Shaffer v Carter*, 252 U.S. 37, 40 S. Ct. 221, 64 L. Ed. 445.

so situated. Nothing less than a specific act of Congress will suffice.

“Puerto Rico, an island possession, *like a territory* (italics added), is an agency of the federal government, having no independent sovereignty comparable to that of a state in virtue of which taxes may be levied.

“A territory or a possession may not do so (tax a federal instrumentality) because the dependency may not tax its sovereign. True, the Congress may consent to such taxation; but the grant . . . of such a general power to tax should not be construed as consent. Nothing less than an act of Congress clearly and explicitly conferring the privilege will suffice.”

Domenech v National City Bank, 294 U.S. 199, 204, 205, 55 S. Ct. 366, 79 L. Ed. 857.

It is important to note also that appellant has not come to the Territory of Hawaii to take up a permanent residence. Appellant was not sent into the Territory of Hawaii but to a military reservation of the United States, by the United States Army in a manner similar to that which obtains in the transferring of personnel in the armed forces. Appellant is subordinate to the United States Army — and it follows that he can be subject to transfer to areas further across the Pacific or even to some station on the mainland of the United States.

During his entire stay on the military reservation, he has maintained his home in the state of Colorado; owns his own home there; pays real estate and personal property taxes there; *has paid taxes on the same*

income sought to be taxed herein; and is domiciled in and a citizen of the state of Colorado.

(Agreed Statement of Facts Nos. 5, 6; T-13.)

It is respectfully urged that in view of the special facts of this instant case only one taxing jurisdiction (other than the federal) can tax appellant's income and that is the state of Colorado and not the Territory of Hawaii.

Appellant is subject to the jurisdiction of the state of Colorado — and it is urged that it then must follow that he cannot be also subject to the jurisdiction of the Territory of Hawaii.

“ ‘We take it to be a point settled beyond all contradiction or question that a state has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction . . .’ *Coe v Errol*, 116 U.S. 517, 524. It is a corollary of this principle that a state has no jurisdiction over any person or thing over which another sovereign power has exclusive jurisdiction.”

From dissenting opinion *Kiker v City of Philadelphia*, 31 A. 2d 289, 298.

Chief Justice Marshall, in *McCullough v Maryland*, 17 U.S. 316, 4 Wheat. 316, 429, had this to say on the subject:

“All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self evident.”

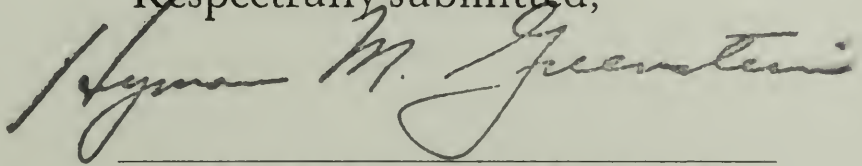
It is therefore respectfully urged that the doctrine of *Coe v Errol*, 116 U.S. 517, 6 S. Ct. 475, 29 L. Ed. 715, to the effect that a state can have jurisdiction only over persons and things within its territory which do not belong to some other jurisdiction (*supra*) is in point. It is this doctrine that impels a consideration that under the special circumstances and facts of the instant case, appellant is not subject to the jurisdiction of the Territory of Hawaii for tax purposes on compensation derived from the United States Army and earned on a military reservation, on the Territory of Hawaii, where in point of fact appellant came to said military reservation from another state; did not lose his citizenship and domicile in that other state; and is already subject to that state's jurisdiction for purposes of taxation on the same income sought to be taxed herein.

CONCLUSION

It is our contention that the judgment and decision appealed from should be reversed.

Dated at Honolulu, T.H., this 15th day of December, 1948.

Respectfully submitted,



HYMAN M. GREENSTEIN,
Attorney for Victor J. Veatch,
Appellant.

Due service and receipt of 5 copies of the within is hereby acknowledged this 15th day of December, 1948.

(s) Rhoda V. Lewis
Assistant Attorney General of the
Territory of Hawaii

Counsel for Appellee.

No. 12,036

IN THE
United States Court of Appeals
For the Ninth Circuit

VICTOR J. VEATCH,

Appellant,

VS.

WILLIAM BORTHWICK, Tax Commis-
sioner of the Territory of Hawaii,

Appellee.

Upon Appeal from the Supreme Court of the
Territory of Hawaii.

BRIEF FOR APPELLEE.

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FILED

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CLERK

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No. 12,036

IN THE
United States Court of Appeals
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VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK, Tax Commis-
sioner of the Territory of Hawaii,

Appellee.

Upon Appeal from the Supreme Court of the
Territory of Hawaii.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This appeal was taken on August 24, 1948, pursuant to 28 U.S.C.A. 225, now Section 1293 of the newly enacted Title 28 of the United States Code. The specification of errors and argument in the opening brief confine the case to No. 4 of the assignment of errors (R. 50). By elaboration in Assignments Nos. 6 and 13 (R. 50, 52) to which the specification of errors also refers, the appeal seeks to present a case involving the Hawaiian Organic Act (31 Stat. 141, c. 339) and the due process clause of the Constitution.

The record shows that the contention presented in Assignment No. 4 was presented in paragraph III of appellant's demurrer to the complaint against him (R. 7) and was preserved by him as Point No. 3 of the points of law appealed to the Supreme Court of the Territory of Hawaii (R. 19). The record further shows reliance by the appellant on the Hawaiian Organic Act and the due process clause of the Constitution both in the demurrer (Par. V, R. 8, and Par. XII, R. 9-10) and in the points on appeal (No. 5, R. 19, and No. 12, R. 21).

Appellee hereby submits that the appeal presents no substantial question.

STATEMENT OF THE CASE.

Appellee agrees with appellant's statement of the case, but supplements it by stating that the tax in question was imposed upon the gross compensation received by the appellant during the period October, 1944, to September, 1946, for services performed as an employee of the United States in a military reservation within the exterior boundaries of the Territory of Hawaii (R. 12). No tax was imposed by the Territory on any other income appellant may have, nor does the income so taxed antedate the effective date of either of the federal acts covering this precise situation, to wit, the Public Salary Tax Act and the Buck Act, below cited. There is but a single factual difference between this case and the *Yerian* case, decided

by this Court in 1942,¹ that is, that the taxpayer lives and works on a military reservation within the Territory. The Buck Act having been enacted for the express purpose of establishing, as a uniform rule, that such fact is immaterial to the validity of state and territorial taxes, an appeal based solely on such fact can only be classed as a frivolous appeal.

QUESTION INVOLVED.

Does the Territory of Hawaii have power to tax the gross compensation received by an employee of the United States during the period October, 1944, to September, 1946, for services performed by him in a military reservation within the exterior boundaries of the Territory where said employee was then living, he being, however, a domiciliary of the State of Colorado?

SUMMARY OF ARGUMENT.

The power of the Territory of Hawaii to impose the tax in question is beyond dispute under the Public Salary Tax Act of 1939 and the Buck Act enacted in 1940; and such power existed even in the absence of such statutes.

¹*Yerian v. Territory*, 130 F.(2d) 786, (Sept. 8, 1942).

ARGUMENT.

I.

THE POWER OF THE TERRITORY OF HAWAII TO IMPOSE THE TAX IN QUESTION IS BEYOND DISPUTE, UNDER THE PUBLIC SALARY TAX ACT OF 1939, AND THE BUCK ACT ENACTED IN 1940.

Appellant concedes (as he necessarily must) that he is subject to the tax on his compensation received as an employee of the United States, if the Territory of Hawaii had jurisdiction to impose such tax (Br. pp. 6-7). Of course the Territory agrees that jurisdiction to tax is essential.

Jurisdiction to tax the income derived from services may be exercised by the state in which the employee is domiciled, or by the state in which he is employed, or by both. *Yerian v. Territory, supra*, and cases there cited (130 F. (2d) at p. 789), supporting the jurisdiction of the state in which the taxpayer is employed; *Lawrence v. State Tax Commission*, 286 U.S. 276, 52 S. Ct. 556, 72 L. ed. 1102, *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 57 S. Ct. 466, 81 L. ed. 666, supporting the jurisdiction of the domiciliary state. That dual taxing jurisdiction may exist as to the same income or other subject of tax, and that such dual jurisdiction may result in double taxation, has been expressly recognized by the Supreme Court.²

²*Guaranty Trust Co. v. Virginia*, 305 U.S. 19, 59 S. Ct. 1, 83 L. ed. 16; *Curry v. McCanless*, 307 U.S. 357, 59 S. Ct. 900, 83 L. ed. 1339, stating as an accepted rule, by way of analogy to the case there in issue, that "income may be taxed both by the state where it is earned and by the state of the recipient's domicile" (p. 368); *Graves v. Elliott*, 307 U.S. 383, 59 S. Ct. 913, 83 L. ed. 1356.

When Congress enacted the Public Salary Tax Act of 1939,³ that statute operated to remove any objection to the taxation of compensation of federal employees based upon the tax immunity of their employer. The legislation originated prior to the decision in *Graves v. People of New York ex rel. O'Keefe*, 306 U.S. 466, 59 S. Ct. 595, 83 L. ed. 927, which as held by this Court⁴ in itself removed the objection.

By the Public Salary Tax Act, Congress left to the appropriate taxing authorities "having jurisdiction to tax", as stated in the Public Salary Tax Act, the matter of state and local taxation of federal salaries. The quoted words required that the taxing body have jurisdiction to impose income taxes and that the particular federal employee be within its taxing jurisdiction. *Rivera v. Buscaglia*, 146 F. (2d) 461, 465, citing the *Yerian* case.

While those states resting their taxing jurisdiction to impose income taxes upon the basis of domicile were not concerned with the place where the income was earned and hence were not concerned with the presence within their exterior boundaries of military and naval reservations of the United States, other states, and also cities, imposing income taxes which made the place where the income was earned the basis of taxing jurisdiction, soon found themselves concerned with the problem of classifying each military or naval reservation of the United States as within or

³53 Stat. 575, c. 59, s. 4, 5 U.S.C.A. 84a.

⁴*Yerian v. Territory*, *supra*.

without the state or city limits from the standpoint of legislative jurisdiction. Meanwhile the increasing reliance by the several states, and by many cities, upon sales and use taxes, intensified the problem.⁵

This problem of "enclaves", so called,⁶ exists as to military and naval reservations in the several states, as distinguished from the territories. The situation as to territories is reviewed in the next point. A brief review of the decisions as to military and naval reservations in the several states will serve as background for the matters upon which Congress legislated in the Buck Act,⁷ and also as background for Point II, *infra*, in which the authorities concerning territories are reviewed. While the situation which troubled the states prior to enactment of the Buck Act never existed in the territories (Point II, *infra*), fortunately Congress included the territories with the states in the Buck Act. Omission of the territories certainly would have led would-be litigants to argue that Congress intended, as to the territories, a policy contrary to that which the Buck Act legislated for the states.

"Enclaves" exist in the several states under and pursuant to Article I, Sec. 8, Cl. 17 of the Constitution, which prescribes that the Congress shall have power "to exercise exclusive legislation in all cases whatsoever, over such district as may * * * become the

⁵See Committee reports on the Buck Act, *infra*.

⁶*Sanders v. Oklahoma Tax Commission*, 197 Okla. 285, 169 P. (2d) 748, cert. den. 329 U.S. 780, 67 S. Ct. 202, 91 L. ed. 670.

⁷54 Stat. 1059, c. 787, approved Oct. 9, 1940, re-enacted as sections 105-110 of the new Title 4 of the United States Code by the Act of July 30, 1947, 61 Stat. 641, c. 389.

seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;
* * *”.

Prior to the Buck Act, lands purchased for a military reservation with the consent of a State did not lie within the State’s territorial taxing jurisdiction. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 50 S. Ct. 455, 74 L. ed. 1091. However, even before the Buck Act, the States could, and sometimes did, qualify their consent to a purchase by the United States so as to retain taxing jurisdiction. *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S. Ct. 208, 82 L. ed. 155; *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 58 S. Ct. 233, 82 L. ed. 187.

In instances where Article I, Sec. 8, Cl. 17 did not literally apply⁸ complete jurisdiction was retained by States over military reservation lands, such instances being where (a) the reservations were not excepted from the jurisdiction of the State at the time of its admission, but were then in existence and hence not “purchased by the consent of the legislature of the state” within the meaning of the constitutional provision, or (b) the reservations were established on lands of the public domain of the United States, hence not “purchased by the consent of the legislature of the state”, or (c) the reservations were acquired by emi-

⁸That Article I, Sec. 8, Cl. 17 is inapplicable in the territories is shown *infra*, Point II.

ment domain or otherwise without the consent of the state legislature. See *Surplus Trading Co. v. Cook*, *supra*, at pages 650-651 of 281 U.S. But even such retained jurisdiction later might be ceded by the states to the United States, reserving taxing jurisdiction (*Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 5 S. Ct. 995, 29 L. ed. 264) or not reserving taxing jurisdiction (*Standard Oil Co. v. California*, 291 U.S. 242, 54 S. Ct. 381, 78 L. ed. 775, *Yellowstone Park Transp. Co. v. Gallatin County*, 31 F. (2d) 644 (C.A. 9th, 1929, cert. denied, 280 U.S. 555, 50 S. Ct. 16, 74 L. ed. 611), dependent upon the exact terms of the cession by the particular state.

The lack of uniformity and the complexity attendant upon the administration of tax acts, with the law as to military reservations as it stood before the Buck Act, can readily be imagined. This led Congress to enact the Buck Act, entitled "An act to permit the States to extend their sales, use, and income taxes to persons residing or carrying on business, or to transactions occurring, in Federal areas, and for other purposes."⁹

The first section of the Act has to do with sales and use taxes, and enacts that "no person shall be relieved from liability * * * on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area." This section gives "full jurisdiction and power to levy and collect any such tax in any Federal area within such State

⁹54 Stat. 1059, c. 787, approved Oct. 9, 1940, re-enacted as sections 105-110 of the new Title 4 of the United States Code by the Act of July 30, 1947, 61 Stat. 641, c. 389.

to the same extent and with the same effect as though such area was not a Federal area.”

The second section has to do with income taxes and similarly provides that “no person shall be relieved from liability * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area.” This section, like the first, gives “full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.”

By Section 6 it is made clear what states are to benefit by the Act. It is there provided (subsection (e)) that:

“* * * any Federal area, or any part thereof, which is located within the exterior boundaries of any State shall be deemed to be a Federal area located within such State.” (Now part of Sec. 110(e) of the new Title 4 of the U. S. Code.)

As this provision is explained in Sen. Rep. No. 1625, 76th Cong. 3d Sess.:

“Any Federal area, or any part thereof, which is located within the exterior boundaries of any State is deemed to be a Federal area within such State for the purposes of this act. For example, Yellowstone National Park is a Federal area which is located within the exterior boundaries of three States (Wyoming, Montana, and Idaho) and therefore, for the purposes of this act, that part of the Park which falls within the exterior boundaries of Wyoming will be included within Wyoming’s taxing jurisdiction, that part which

falls within Montana will be included within Montana's taxing jurisdiction, and that part which falls within Idaho will be included within Idaho's taxing jurisdiction."

Section 6 also contains definitions including a Territory in the term "State" (subsection (d)), and including taxes levied on gross income in the term "income tax" (subsection (c)).

Appellant argues that the Buck Act accomplished nothing. Congress stipulated in section 1 as to sales and use taxes, and in Section 2 as to income taxes, that the tax to which Congress consented must be levied by a State, or duly constituted authority therein, "having jurisdiction to levy such a tax". This is construed by appellant as meaning that the jurisdiction of the State must be sustained independently of all of the provisions of the Act. As to income taxes, appellant argues that the State must have domiciliary jurisdiction over him. As to sales and use taxes, these being based on territorial jurisdiction alone, it does not appear what independent ground of jurisdiction there could be. Of course it was not the intent of Congress to require that a state or other taxing authority have independent taxing jurisdiction, since that would strip the Act of meaning. The intent of this provision, i. e., "having jurisdiction to levy such a tax", both in Section 1 and Section 2, was to require that the state or other taxing authority have jurisdiction but for the specific grounds and reasons immediately following which in said Sections 1 and 2 are stated not to be objections to tax liability. Thus in

Section 1 it is required that the state or other taxing authority have jurisdiction to levy a sales or use tax but for the occurrence of the sale or use, in whole or in part, within a Federal area.¹⁰ In Section 2 it is required that the state or other taxing authority have jurisdiction to levy an income tax but for the residence of the taxpayer, or the occurrence of the transactions or performance of the services from which the income is received, within a federal area.¹¹ By this means, as in the Public Salary Tax Act (Br. pp. 7-8), Congress limited its consent to the elimination of specific objections to state and local taxes. In the earlier Act the subject of the consent was the fact of employment by the United States. In the later Act, the subject of the consent was the fact of source of the tax in a federal area.

¹⁰Section 1 reads:

“(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.”

(Now Section 105(a) of the new Title 4 of the U.S. Code.)

¹¹Section 2 reads:

“(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such state to the same extent and with the same effect as though such area was not a Federal area.”

(Now Section 106(a) of the new Title 4 of the U.S. Code.)

In *Bowers v. Oklahoma Tax Commission*, 51 F. Supp. 652 (D.C. W.D., Okla. 1943), the Court, after quoting language in Section 1 of the Buck Act concerning sales and use taxes, which is identical to that used in Section 2 concerning income taxes, said:

“Language could hardly be more explicit.”

In *Kiker v. City of Philadelphia*, 346 Pa. 624, 31 A. (2d) 289, cert. denied, 320 U.S. 741, 64 S. Ct. 41, 88 L. ed. 439, a case precisely in point upholding the levy of the gross income tax upon the salary of a non-resident derived from services performed in a federal area, the court said of the contention made by appellant in this case:

“* * * Such a construction is the equivalent of saying that Congress merely intended to authorize the States to tax persons whom they were already permitted to tax. We cannot permit such an absurd construction to nullify this legislation.
* * *”

The Court below said of the Buck Act:

“It seems clear that the above Act was expressly designed to express the consent of the United States to the levy by the States and Territories of just such a tax as the one here involved against persons residing and employed just as the defendant resides and is employed, and that the Congress had authority to so consent for the United States.”

(Rec. 41.)

While it is hardly necessary to resort to the legislative history of the Buck Act, it is set forth below

for the convenience of the Court, should the Court wish to refer to it.

Initially the Buck Act was framed "to authorize the levy of State, Territory, and District of Columbia taxes upon, with respect to, or measured by sales, purchases, or use of tangible personal property * * * occurring in United States National Parks, military and other reservations or sites over which the United States government may have jurisdiction."

As so drawn the bill passed the House at the first session of the 76th Congress, and went to the Senate where it was referred to the Committee on Finance. That Committee reported it to the Senate with clarifying changes on July 28, 1939 (Sen. Rep. 1028, 76th Cong., 1st Sess.). The report states:

"The purpose of the bill is to provide that State sales and use taxes shall apply with respect to transactions in Federal areas in the same manner and to the same extent as with respect to transactions outside such areas. * * * The bill will not affect any right to claim an exemption from such taxes on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred."

The report sets forth the report of the Committee on Ways and Means of the House, H. Rep. No. 1267, 76th Cong., 1st Sess., to the same effect.

After being so reported by the Senate Finance Committee on July 28, 1939 the bill encountered objections on the floor (see Vol. 84, Cong. Rec. Part 10, pp.

10685 and 10907, with respect to the effect of the bill as to Indian reservations).

It was recommitted to the Committee on Finance, was reported with amendments, and was enacted with these amendments.¹² As so reported by the Senate Committee (Sen. Rep. No. 1625, 76th Cong., 3d Sess.):

“In general, the bill, as amended, proposes to do three things. First, it provides that State sales and use taxes (with certain exceptions which are hereafter explained) shall be applicable with respect to transactions occurring within Federal areas in the same manner and to the same extent as they are applicable with respect to transactions occurring outside such areas and within the State. Second, it provides that State income taxes shall be applicable with respect to persons residing within a federal area or receiving income from transactions occurring or services performed in such area in the same manner and to the same extent as they are applicable with respect to persons residing outside such area or receiving income from transactions occurring or services performed outside such area. Third, it contains certain clarifying amendments to section 10 of the Federal Highway Act of June 16, 1936 * * *”

The report then proceeds with “Detailed Explanation of the Bill”, and as to Section 2 (now Section 106 of Title 4) has this to say:

“Section 2(a) of the committee amendment removes the exemption from income taxes levied by a State, or any duly constituted taxing authority

¹²Vol. 86, Cong. Rec. Part 11, pp. 12834-5; id., Part 12, p. 12998.

in a State, where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area. One of the reasons for removing the above exemption is because of an inequity which has arisen under the Public Salary Tax Act of 1939. Under that act a State is permitted to tax the compensation of officers and employees of the United States when such officers and employees reside or are domiciled in that State but is not permitted to tax the compensation of such officers and employees who reside within Federal areas within such State. For example, a naval officer who is ordered to the Naval Academy for duty and is fortunate enough to have quarters assigned to him within the Naval Academy grounds is exempt from the Maryland income tax because the Naval Academy grounds are a Federal area over which the United States has exclusive jurisdiction, but his less fortunate colleague, who is also ordered there for duty and rents a home outside the Academy ground because no quarters are available inside, must pay the Maryland income tax on his Federal salary. Another reason for removing the above exemption is that under the doctrine laid down in *James v. Dravo Contracting Co.*, 1937, 302 U. S. 134 [58 S. Ct. 208, 82 L. Ed. 155, 114 A.L.R. 318], a State may tax the income or receipts from transactions occurring or services performed in an area within the State over which the United States and the State exercise concurrent jurisdiction but may not tax such income or receipts if the transactions occurred or the services were performed in an area within the

State over which the United States has exclusive jurisdiction.”

Because of the importance attached by counsel for appellant to Section 4 of the bill, now Section 108 of the new Title 4 (Br. p. 8), the committee’s report on this section is quoted below. Counsel for appellant apparently construes this section as nullifying all the remainder of the statute. All that it says is that the United States shall not be deemed to have been deprived of exclusive jurisdiction over Federal areas, where theretofore enjoyed, “for the purposes of any other provision of law”, that is, laws other than the tax laws to which consent was given by the bill. The committee report says:

“Section 4 of the committee amendment was inserted to make certain that the criminal jurisdiction of Federal courts with respect to Federal areas over which the United States exercises exclusive jurisdiction would not be affected by permitting the States to levy and collect sales, use, and income taxes within such areas.”

The enactment of Title 4 of the United States Code was subsequent to the period involved in this case, and moreover in enacting Title 4 Congress made no change in the Buck Act. As stated in House Rep. No. 252, 80th Cong. 1st Sess., accompanying House Rep. No. 1566, which became the statute enacting Title 4, this House Report being repeated in Sen. Rep. No. 659 of the same session on the same bill, the purpose simply was to enact Title 4 into positive law, without material change. Thus it is stated by the Committee

on the Judiciary of the House and repeated by the Senate Committee on the Judiciary:

“This bill is intended to codify and enact into positive law the various provisions of laws now contained in title 4 of the United States Code.

“Under existing law these sections of title 4 of the United States Code are merely *prima facie* evidence of the law. They are taken from a number of acts and the Revised Statutes and are grouped together and classified for convenience
* * *

* * * * *

“This bill takes each section of title 4 of the United States Code, 1940 edition, as of January 2, 1947 and without any material change enacts each section into positive law. No attempt is made in this bill to make amendments in existing law. That is left to amendatory acts to be introduced after the approval of this bill.”

This policy of literal enactment of the existing law caused the Library of Congress to comment on Section 108 of the bill in its analysis of the bill, appended to the Senate Committee Report (Sen. Rep. No. 659, 80th Cong. 1st Sess., *supra*). It will be recalled that this was the section (originally Section 4) preserving the criminal jurisdiction of the United States notwithstanding the consent to exercise of state taxing jurisdiction given by the Buck Act. As reenacted the section still refers only to the provisions of the Buck Act, and does not refer to a law antedating the Buck Act, having to do specifically with gasoline taxes in federal areas, now Section 104 of Title 4. This

caused the reporter who made the analysis for the Library of Congress to comment on the difficulties of literal reenactment of laws in one code. Why opposing counsel referred to this Library of Congress analysis (Br. p. 8) does not appear.

II.

THE POWER OF THE TERRITORY OF HAWAII TO IMPOSE THE TAX IN QUESTION EXISTED EVEN IN THE ABSENCE OF THE PUBLIC SALARY TAX ACT OF 1939 AND THE BUCK ACT ENACTED IN 1940.

That the states and territories had power to tax federal salaries under the doctrine of *Graves v. O'Keefe*, *supra*, even in the absence of the Public Salary Tax Act, was held by this Court in the *Yerian* case.

As to the federal areas, no uniform rule would exist in the absence of the Buck Act, and to establish uniformity was the very purpose of that Act. Thus, in the several states, the scope of the taxing jurisdiction might or might not be as wide in the absence of the Buck Act as it is under that Act, dependent upon the circumstances as to the particular state and federal areas concerned.

This lack of uniformity existed before the Buck Act because whenever Article I, Sec. 8, Cl. 17 of the Constitution did not literally apply the State retained full jurisdiction over military and other federal reservations in the absence of a legislative cession of juris-

diction. (Supra, circa footnote 8). Of course the constitutional provision, which refers to states, does not literally apply in a territory of the United States, and the only question in a territory is what Congress intended.

The power of Congress is paramount over the entire area of a Territory.¹³ In a state Congress must acquire, by reason of application of Article I, Sec. 8, Cl. 17 of the Constitution or by a cession of jurisdiction, the paramount position, as to one or more federal reservations, which Congress necessarily occupies as to the whole area of a Territory. Where such paramount position is acquired as to a particular federal reservation in a state there is no legislative authority but that of Congress, since Congress has not made it a practice to organize governments for such reservations. In the territories, Congress has exercised its paramount authority by organizing governments. The government so organized by Congress for the Territory of Hawaii is sovereign, subject only to the power of Congress to intervene, and it has all the taxing power which Congress itself could have exercised. *Kawananakoa v. Polyblank*, 205 U.S. 349, 27 S. Ct. 526, 51 L. ed. 834 (as to the character of the government); *Yerian v. Territory*, supra; *Rivera v. Buscaglia*, supra, 146 F. (2d) 461 (C.C.A. 1st, 1944); *Haavik*

¹³*Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 5 S. Ct. 995, 29 L. ed. 264 (Br. p. 11), states this well-settled rule in remarking that the issue of federal as distinguished from state jurisdiction over Fort Leavenworth only arose when Kansas was admitted as a state. The discussion in this part of the brief further develops this point.

v. Alaska Packers Ass'n, 263 U.S. 510, 513 (as to its taxing power).

This leaves only one question to be decided, that is, whether Congress organized the territorial government for the whole area of the Territory, or excluded the federal reservations.

In organizing the territorial government, Congress did not except from the jurisdiction thereof any federal reservation. Hawaiian Organic Act, 31 Stat. 141, c. 339, approved April 30, 1900. In the organization of a state government a similar failure to make an exception for the federal reservations would confer upon the state complete governmental authority. *Fort Leavenworth R. R. Co. v. Lowe*, *supra*. That there was at least one federal reservation in existence when the Hawaiian Organic Act was passed appears from *Territory v. Carter*, 19 Haw. 198, in which it was held that Congress had not excepted it from the jurisdiction of the Territory, nor had the legislature or Congress ever taken any action to except it from the jurisdiction of the Territory, and that the Territory had jurisdiction over the federal reservation, in this instance a naval reservation.

The Hawaii National Park Act is the only instance of action by Congress (or by the Legislature of the Territory) excepting land from the Territory's jurisdiction. This is the Act of April 19, 1930, 46 Stat. 227, c. 200, as amended, 16 U.S.C.A. 395. It provides:

“Sec. 1. That hereafter sole and exclusive jurisdiction shall be exercised by the United States

over the territory which is now or may hereafter be included in the Hawaii National Park in the Territory of Hawaii, saving, however, to the Territory of Hawaii the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed outside of said park, and saving further to the Territory of Hawaii the right to tax persons and corporations, their franchises and property on the lands included in said park. * * *''

It will be observed that Congress resumed its direct authority over the National Park "hereafter", recognizing that theretofore the National Park had been within the jurisdiction of the territorial government created by it. It will be observed, further, that Congress left in the territorial government taxing jurisdiction and certain other powers; a contrary policy as to other federal reservations within the Territory certainly cannot be found by mere implication. In the states, as well, the policy of Congress, even before the Buck Act, often has favored retention of taxing jurisdiction by the local government. See *Superior Bath House Co. v. McCarroll*, 312 U.S. 176, 61 S. Ct. 503, 85 L. ed. 721.

Appellant suggests that mere use by the federal government of land for military reservation purposes *ipso facto* ousts the Territory of jurisdiction (Br. p. 11). Here appellant departs from the argument of analogy to the rules of law governing federal reservations in the states and argues that ouster of territorial

jurisdiction can be effected by executive action. This contention was considered and denied by the Attorney General of the United States in an opinion of December 10, 1906, concerning the effect of an Executive Order creating a naval reservation in the Philippine Islands (26 Ops. Att'y Gen. 91). This opinion was cited by the Supreme Court of the Territory of Hawaii in *Cassels v. Wilder*, 23 Haw. 61, in upholding the taxing jurisdiction of the Territory over a privately owned automobile within Schofield Barracks.

In *Gromer v. Standard Dredging Company*, 224 U.S. 362, 370, 32 S. Ct. 499, 56 L. ed. 801, the Supreme Court of the United States cited the Attorney General's opinion in support of its conclusions. This case involved the question whether the Puerto Rico government had taxing jurisdiction over the harbor of San Juan in view of an exception of harbor areas from the transfer of public properties to the control of the Puerto Rico government made by the Foraker Act of April 12, 1900, and in view of a similar exception in the Act of July 11, 1902, which reserved from a grant made to the Puerto Rico government the harbor areas, army and navy reservations, and other reservations. The Supreme Court held that these exceptions and reservations were proprietary in nature and not limitations upon the exercise of government (p. 366 of 224 U.S.). In reaching this conclusion the Court stated the rule as to military and other reservations in the territories, and distinguished them from those in the states, as follows:

“The United States could have reserved government control and exercised it as it does in instances, by the consent of the States, over certain places in the States devoted to the governmental service of the United States. We do not think, as we have said, that the United States has done so, and that it has not is the view of the executive department of the Government as expressed through the Attorney General. The War Department entertained the same view as to military reservations in Porto Rico and also as to such reservations in the Philippine Islands.

“Section 12 of the Philippine Act placed all property rights acquired from Spain under the control of the island government for the benefit of its inhabitants, except ‘such land or other property as shall be designated by the President of the United States for military and other reservations for the Government of the United States.’ The extent of the power thus reserved was referred for consideration by the Secretary of War to the Attorney General, and in an opinion written by Solicitor General Hoyt and approved by Attorney General Moody it was held that the provisions granted and reserved property, but did not confer governmental jurisdiction. It was said in the course of the opinion, after referring to the provisions of the Philippine Act which directed that all laws passed by the Philippine Government should be reported to Congress and the reservation by Congress of the power to annul the same (a similar provision is in the Porto Rico Act),* that ‘the relation of Congress to all terri-

*Congress has power to annul any act of the legislature of the Territory of Hawaii. *Inter-Island Steam Navigation Co. v. Territory of Hawaii*, 305 U.S. 306, 59 S. Ct. 202, 83 L. ed. 189.

torial legislation is similar [certain organic acts of the States being cited], and thus it may be said that the exercise of local jurisdiction for ordinary municipal purposes over a reservation in a territory is valid until and unless disapproved by Congress' 26 Op. Atty. Genl. 91, 97." (pp. 370-371.)

The military reservation involved in this case is Hickam Field. In providing for Hickam Field Congress enacted:

"That the Secretary of War is hereby authorized to cause condemnation proceedings to be instituted for the purpose of acquiring certain tracts of land in the vicinity of Fort Kamehameha Reservation, Territory of Hawaii, hereinafter described, for use as a flying field, and that a sum not exceeding \$1,145,000 is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, for the acquisition of the fee simple title to said land either by purchase or condemnation, * * *.' 45 Stat. 750, c. 754."

Certainly the provisions of this statute have to do solely with the title to the land involved, and the holding in *Gromer v. Standard Dredging Co., supra*, that such a proprietary enactment is not a limitation upon the exercise of taxing jurisdiction by the territorial government, is squarely in point.

The cases concerning territories sustain their taxing and other legislative jurisdiction over the reservations. In addition to *Territory v. Carter, supra*, and *Cassels v. Wilder, supra*, decided by the Supreme Court of

the Territory of Hawaii, see *Reynolds v. People*, 1 Colo. 179; *Rice v. Hammond*, 19 Okla. 419, 91 Pac. 698. In the argument of counsel in *Surplus Trading Co. v. Cook*, *supra*,¹⁴ *Cassels v. Wilder* and *Rice v. Hammond* were cited¹⁵ in support of the taxing jurisdiction of the state of Arkansas, but Camp Pike there involved, a reservation falling squarely within the provisions of Article I, Sec. 8, Cl. 17 of the Constitution, was distinguished by the Court from military reservations in the territories, which the Court placed in the same class as reservations in the states not falling under Article I, Sec. 8, Cl. 17 of the Constitution (examples of such reservations having been given by the Court, see *supra* circa footnote 8).

The opening brief cites *West v. West*, 35 Haw. 461, involving the establishment of domicile for purposes of divorce. Libelant was an enlisted man in the United States Navy. In holding he had acquired domicile in Hawaii the Court pointed out that he was not under orders as to the place of his residence, since he was permitted to choose his own abode and not required to live in assigned quarters. This had bearing on his intention to take up residence in Hawaii prior to the date when he changed his home address on his service record. The case has no bearing on the matter of legislative jurisdiction over military reservations, which is not even mentioned in the opinion. That the Court did not, in *West v. West*, overrule *Territory v. Carter* and *Cassels v. Wilder*, is obvious from its opinion in the case at bar (R. 39).

¹⁴281 U.S. 647, 652, 50 S. Ct. 455, 74 L. ed. 1091.

¹⁵74 L. ed. 1093.

CONCLUSION.

The decision of the Supreme Court of Hawaii affirming the judgment recovered by appellee for taxes in the amount of \$237.35 should be affirmed by this Court.

Dated at Honolulu, Territory of Hawaii, January 14, 1949.

Respectfully submitted,

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No. 12036
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT COURT

VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK, Tax Com-
missioner of the Territory of Hawaii,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the Supreme Court for the
Territory of Hawaii

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FILED

FEB 1 1949

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No. 12036
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT COURT

VICTOR J. VEATCH,

Appellant,

vs.

WILLIAM BORTHWICK, Tax Com-
missioner of the Territory of Hawaii,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the Supreme Court for the
Territory of Hawaii

INTRODUCTION

In view of the fact that appellee has seen fit to label our appeal as frivolous¹ it is deemed imperative to submit herewith a brief in reply, which can be outlined as follows:

¹ Appellee's Brief, P. 3.

- I. This appeal is not frivolous.
- II. Appellant cannot accept appellee's statement of the case.
 - A. The military reservation in question is not within the Territory of Hawaii, jurisdictionally speaking.
 - B. There is more than a single factual difference between this and the *Yerian* case.
 - C. The fact that appellant lives and works on a military reservation is material.
- III. The Territory of Hawaii does not have the power to impose the tax in question on this particular appellant.
 - A. The federal statutes² do not grant this power.
 - B. The power of the Territory to impose the tax in question does not exist "even in the absence of such statutes."

I.

THIS APPEAL IS NOT FRIVOLOUS.

There are so many income tax aspects to a simple statement of facts that the questions involving the taxation of incomes cannot be considered lightly nor an appeal frivolous. The subject of taxation itself is a very broad field and cannot be treated lightly. The very foundations of the United States rest upon it. It was the principle of "no taxation without representation" that was the decided stimulus toward the formation of the union and the struggle for independence among the several colonies. Its importance has not diminished today. The Supreme Court of

² Public Salary Tax Act of 1939, and the Buck Act.

the United States has repeatedly granted certiorari in taxation cases for the reasons stated so aptly by Mr. Justice Frankfurter:

“... Wise tax policy is one thing; constitutional prohibition quite another. The task for devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statement. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations.”

Newark Fire Insurance Co. v. State Board of Tax Appeals, 307 U.S. 313, 324, 83 L. E. 1312, 59 S. Ct. 918 (1938).

The very strict rule relative to appeals, that has been frequently cited that:

“An appeal will not be dismissed, on motion, on the ground that it is frivolous or for delay.”

Amory v. Amory, 91 U.S. 356, 23 L. Ed. 436.

has been modified somewhat by later decisions, but the recognized tendency is contained in the following:

“Appeals are favored by law and an appeal will not be regarded as ‘frivolous’ unless it clearly appears that appellant’s counsel does not honestly believe that there is merit in his contentions and that the proceeding was taken merely for purposes of delay.”

J. J. Clarke Co. v. Toye Bros. Yellow Cab Co., 22 So. (2d) 298, 300, 301 (La.).

In this connection also it is worthy of note that appellee entered an answering brief of some 26 pages of print, involving considerable research with 43 citations, so it must

be apparent on the face that appellee does not actually consider the appeal frivolous.

"If an argument is required to show that the pleading is bad, it is not frivolous."

Macarone v. Hayes, 82 N.Y.S. 1005, 1008, 85 App. Div. 41, citing *Youngs v. Kent*, 46 N.Y. 672.

"A 'frivolous pleading' is one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the pleadings, that its character may be determined without argument or research; and a pleading is not frivolous if a defense can be spelled out from it, or any part of it."

Germain v. Harwell, 66 So. 396, 398; 108 Miss. 396.
Nolen v. State, 150 P. 149, 150; 48 Okl. 594.

II.

APPELLANT CANNOT ACCEPT APPELLEE'S STATEMENT OF THE CASE.

A. THE MILITARY RESERVATION IN QUESTION IS NOT WITHIN THE TERRITORY OF HAWAII, JURISDICTIONALLY SPEAKING.

Such part of appellee's statement of the case that implies that the military reservation in question is "within"³ the Territory of Hawaii is not acceptable to appellant in that it is not a part of the agreed statement of facts and raises

³ This question is actually posed by the definition set forth in the Compensation and Dividends Tax Act itself:

"'Compensation' shall mean and include commissions, fees, wages, salaries, bonuses and every and all other kinds of compensation paid for or attributable to *personal services performed within the Territory . . .*" (Emphasis added. Sec. 5342, Revised Laws Hawaii, 1945.)

the very ultimate question which this court is being requested to determine:

“Appellee agrees with appellant’s statement of the case, *but supplements it* by stating that the tax in question was imposed upon the gross compensation received by the appellant during the period October 1944 to September 1946, for services performed as an employee of the United States in a military reservation *within the exterior boundaries of the Territory of Hawaii.*”

(Underlining added—Appellee’s Brief, p. 2.)

The references by appellee in its statement of the case⁴ to the reservation being “within” the Territory sidestep the issue herein.

The question is not whether the military reservation is part of the Territory of Hawaii, geographically speaking—but whether it is within the jurisdiction of the Territory, and more particularly, whether this taxpayer, on the facts given, is within its taxing jurisdiction.

B. THERE IS MORE THAN A SINGLE FACTUAL DIFFERENCE BETWEEN THIS AND THE *YERIAN* CASE.

This case is distinguishable from the *Yerian*⁵ case in the following material respects:

1. In the instant case appellant lives and works on a military reservation.

(Agreed statement of facts 1 and 4. T-12.)

(Yerian did neither.)

⁴ Appellee’s Brief, P. 2, 3.

⁵ 130 F. (2d) 786.

2. Domiciled in and a citizen of the State of Colorado, appellant has paid a net income tax to the State of Colorado on the same income sought to be taxed herein by the Territory of Hawaii (Agreed statement of facts, 6, T-13), and hence a question of triple taxation is involved.

3. Yerian maintained a residence in the Territory of Hawaii.⁶

C. THE FACT THAT APPELLANT LIVES AND WORKS ON A MILITARY RESERVATION IS MATERIAL.

Appellant respectfully begs to differ with appellee on the question of the materiality of appellant living and working on a military reservation.

That distinguishing factor is the very fulcrum of this case insofar as the question of jurisdiction is involved.

It is that factor which must of necessity require the Territory to affirmatively establish that it has jurisdiction over appellant.

Even appellee agrees that

“Of course the Territory agrees that jurisdiction to tax is essential,” (Appellee’s Brief, p. 4).

and it is our position, as already set forth in our opening brief, that the Territory must first establish jurisdiction over the person of this appellant before its tax laws can be imposed upon him.

In the *Yerian* case, plaintiff was employed by the Home Owner’s Loan Corporation, and resided in the Territory of Hawaii.

⁶ See same case, 35 Haw. 855, 859, stipulated facts no. 5.

Like any other resident of the Territory of Hawaii, he had, beyond the question of a doubt, subjected his person to the jurisdiction of the Territory.

The status of civilians living and working on military bases within territories of the United States has been the subject of much discussion and much interpretation. It seems to have been variously ruled upon and is usually determined by the Organic Act of the Territory involved.

Attention should be called to the following section of the Organic Act for the Territory of Hawaii:

“No person shall be allowed to vote who is in the Territory by reason of being in the Army or Navy *or by reason of being attached to troops in the service of the United States.*”

(Underlining added—48 U.S.C.A. Sec. 619.)

Civilians employed by the federal government and living and working on military reservations in the Territory of Hawaii should be considered to come within the above classes of persons.

Appellant respectfully urges that the facts that he is domiciled in and a citizen of the State of Colorado; that he has paid a net income tax to the State of Colorado on the same income sought to be taxed herein by the Territory of Hawaii; and that he lives and works on a military reservation are points of difference between the instant case and the *Yerian* case and that they are material.

It must follow that in the levying of taxes upon incomes from trades, professions or employment, that jurisdiction over the person must be established before the tax can be considered applicable. If this were not so, then Congress

need not have included such a qualification in the Buck Act.

III.

THE TERRITORY OF HAWAII DOES NOT HAVE THE POWER TO IMPOSE THE TAX IN QUESTION ON THIS PARTICULAR APPELLANT.

A. THE FEDERAL STATUTES DO NOT GRANT THIS POWER.

Appellant cannot resist pointing out that the argument of appellee is in the last analysis mutually inconsistent.

On the one hand it is argued that the power to impose the tax in question is beyond dispute under the Public Salary Tax and Buck Acts, and on the other, that it has such power even in the absence of these federal statutes.

If such is the case the arguments of appellee under each heading must of necessity cancel each other out.

Before plunging into an analysis of the cases urged by appellee in support of its contentions a further consideration of the cases most heavily relied upon by appellee is in order.

In connection with the *Yerian* case, it should be kept in mind, that by maintaining a residence in the Territory of Hawaii, Yerian subjected himself to the jurisdiction of the Territory, and came within the general rule that is applied in such cases:

"In our system of government the states have general dominion, and saving as restricted by particular provisions of the federal constitution, complete dominion over all persons, property and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons,

property and business, and in consequence have the power normally pertaining to government to resort to all reasonable forms of taxation in order to defray the government expenses.”

Wood v. Tawes, 28 A. (2d) 850, 853.

And on page 854, the court continues:

“All these appellants, indeed, shared during the taxable year in the benefits of the expenditures by the state for the various activities of its government. As the trial judge pointed out, the public schools were available to their children; they had the benefit of police protection for themselves, their families and their property; they could use the public roads daily; the courts were open for resort by them if necessary; and so with every other benefit and privilege provided by the state or its agencies, such, for instance, as water supply and sewerage. They entered upon the enjoyment of these benefits, and should be liable to a share in the taxation levied to maintain them, in the absence of any distinguishing factor in their situation.”

It must then become clear from a reading of this case and even the cases cited by appellee that there must be present some activity that places the person under the taxing jurisdiction of the state or territory in question.

Either his person, property or business transactions must come within the jurisdiction of the state or territory to make him subject to taxation.

In the *Yerian*,⁷ *Wood*,⁷ and *Rivera*⁸ cases, it was the actual residence of the taxpayer that so subjected him.

⁷ *Supra*.

⁸ *Rivera v. Buscaglia*, 146 F. (2d) 461.

In other cases cited by appellee it was the business activity, as will be pointed out more in detail below.

If this were not the case, incomes would be subject to triple taxation throughout the country.

It is respectfully submitted that, Congress, when it passed the Buck Act, did not intend to permit the unconscionable burden of triple taxation.

On the contrary, Congress insisted that domicile be established as a basis for income taxation in the District of Columbia Income Tax Law so that there would be no question of triple taxation (by Federal, State of domicile and the District of Columbia). In drafting this bill, it was said by Representative Bates:

“We raised that particular point (in conference) because we are much concerned about how those who come from our states would be affected by the income tax provisions of the new laws, and it was distinctly understood that in this bill there should be no triple taxation . . .” 84 Cong. Rec. 8973.

In construing the provisions of the District of Columbia Income Tax Law, the Supreme Court has held that persons coming to the District of Columbia to work for the Federal government, even for an indefinite period of time, should not be subject to the tax if it be proved that a domicile elsewhere actually existed.

“Did he pay taxes in the old community because of his retention of domicile which he could have avoided by giving it up? Were they nominal or substantial? In view of the legislative history showing that Congress was concerned lest there be ‘triple taxation’ — Federal, State and District (of Columbia)—the Board

should consider whether taxes similar in character to those laid by the Act have been paid elsewhere.”

District of Columbia v. Murphy, 314 U.S. 441, 458.⁹

Appellant contends that federal employees would be reluctant to accept employment on military bases located within the geographical limits of states which levied heavy income taxes, which they must meet, together with similar taxes assessed by their domiciliary state, if triple taxation be mandatory.

Other states and territories might decide to levy taxes on the income of persons who merely entered their borders and conducted even a day's business or work. Government employees whose territory extended over large geographical areas inclusive of several states could be taxed by any state or territory through which they passed.

To permit such overlapping of taxation would result in the clashing of sovereignties — something to be avoided.

As Chief Justice Marshall well said:

“We have a principle which is safe for the states and safe for the union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to destroy what there is a right in another to preserve.”

McCulloch v. Maryland, 17 U.S. 316.

It was to avoid the possibility of just such confusion and controversy that the matter of “jurisdiction” to tax was

⁹ Accord: *D. C. v. Pace*, 320 U.S. 698; followed:

Beedy v. District of Columbia, 126 F. (2d) 647.

Collier v. District of Columbia, 161 F. (2d) 649.

Beckham v. District of Columbia, 163 F. (2d) 701.

specifically referred to in the Public Salary Tax Act of 1939 and the Buck Act.

If carried to its ultimate end, the very basis of income taxation would be defeated and the taxing standards prove futile. It would open the way for retaliatory taxes *ad infinitum*.

These particular facts coupled with the factor that we are dealing with the power of a territory as distinguished from that of a state lead counsel to suggest that there is *no* case squarely in point with the instant appeal.

Appellee insists that the *Kiker*¹⁰ case is precisely in point with the instant appeal.

This we answer by respectfully suggesting that the dissenting opinion represents the view more nearly correct and applicable to the case at bar.

Moreover, the tax there was not that of a state or territory, but that of a municipality. It is conceivable that the tax by a municipality would be allowed where the tax of a corresponding sovereign state would be disallowed, in that the question of domicile might not be as material to a municipal tax as it would in the case of a state or territory. For there the taxpayer would not be able to show he has paid an identical tax on the same governmental sphere or plane.

But even in the *Kiker* case the court went to great length to show some benefit to the taxpayer before permitting the tax.¹¹

¹⁰ *Kiker v. City of Philadelphia*, 346 Pa. 624, 31 A. (2d) 289.

¹¹ "The reservation is immediately adjacent to Philadelphia . . . Plaintiff may at all times use the street, bridges and other facilities of the City and also has the benefit of its police and fire departments when engaging in business or pleasure in that municipality, as well as many other advantages. It is common knowledge that the City of Philadelphia cuts all ice, and

Furthermore, the area in question there was within a state, and not a territory, hence differing in type of sovereignty than in the instant case.

It is this very fact that in the instant case we have a taxpayer, domiciled in one state, paying taxes to this state, on the same income that is sought to be taxed herein that distinguishes our case, and raises a serious doubt as to the power of Congress to give its consent to taxation within federal areas and have that consent work in all cases. Not only is involved the taxing authority of the state or territory and the federal area, but also the sovereignty of the state of the domicile of the taxpayer which must be considered.

Appellee asserts that:

“Jurisdiction to tax the income derived from services may be exercised by the state in which the employee is domiciled, or by the state in which he is employed, or both.”

(Appellee’s brief, p. 4.)

A careful examination of the cases submitted by appellee in support of such contention shows that the cases cited do not actually stand for such a proposition.

Neither the *Yerian*¹² nor *Lawrence*¹³ cases are authority for the dual incidence of taxation. In fact, the latter case supports the position of appellant in that:

keeps the Delaware River navigable from the northern limits of the City to Chester, where in the winter months navigation would otherwise be closed, making possible to plaintiff the transportation he uses to go to and return from League Island to his home in New Jersey. This is decidedly a benefit to him.” *Kiker v. City of Philadelphia*, 31 A. (2d) 289, 295.

¹² *Supra*.

¹³ *Lawrence v. State Tax Commission*, 286 U.S. 276.

“... domicile in itself establishes a basis for taxation.”
Lawrence v. State Tax Commission, 286 U.S. 276,
 279.

The “dual taxing jurisdiction” that appellee refers to is based upon the particular facts of each case and the nature of the property sought to be taxed, and in each case there is a definite basis for the tax by each jurisdiction.¹⁴

The case of *Rivera v. Buscaglia*¹⁵ is actually a case in support of the proposition appellant urges.

There the tax upon federal employees was upheld because of their “residence” on the island.

It is important to note that in the case of *Surplus Trading Co. v. Cook*, 281 U.S. 647 (Cited by appellee, Brief p. 7) the personal property within the military reservation was held not subject to the personal property tax levied by the State of Arkansas.

The *Dravo* and *Silas Mason* cases¹⁶ were mainly concerned with public construction jobs on navigable rivers.

In the latter case it was held that the United States Reclamation Act was not intended to provide for the acquisition of exclusive jurisdiction, and further:

“... the evidence is clear that the Federal Government contemplated the continued existence of state jurisdic-

¹⁴ Both *Graves v. Elliott* and *Curry v. McCanless*, cited by appellee in support of the double taxation argument, were based upon the peculiarities that exist upon death, where both the state of domicile and state where the intangibles are located were permitted to impose inheritance taxes. And in the *Guaranty Trust Co.* case also cited by appellee, the state of Virginia taxed the resident beneficiary because the income was received within its jurisdiction, while New York taxed the discretionary trust that was established and administered there.

¹⁵ *Supra*.

¹⁶ *James v. Dravo Contracting Co.*, 302 U.S. 134.
Silas Mason Co. v. Tax Commission, 302 U.S. 186.

tion consistent with federal functions and invited the cooperation of the state in providing an appropriate exercise of local authority over the Territory.”

“School facilities were to be, and have been provided with the local authorities. Police protection was to be, and has been, assured by cooperation with the State patrol. Cognizance of crimes committed within the area has been taken by local prosecutors and judicial officers. It is futile to say that these local authorities became federal authorities *pro hac vice*, for the contracts which have been ratified by Congress manifestly contemplated action by the local officers as representatives of the State and acting in the exercise of state jurisdiction.”

Silas Mason v. Tax Commission, 302 U.S. 186, 208, 209.

The *Bowers v. Oklahoma Tax Commission* case concerned the imposition of a use tax, and it is respectfully submitted that there might well be a different jurisdictional base with respect to a use tax as compared with an income tax.

It can hardly seriously be contended that these cases are comparable to the case at bar.

It is possible in similar manner to dispose of other cases cited by appellee as being distinguishable from the case at bar on the facts indigenous to each.

B. THE POWER OF THE TERRITORY TO IMPOSE THE TAX IN QUESTION DOES NOT EXIST “EVEN IN THE ABSENCE OF SUCH STATUTES.”

Appellee’s second point of argument that the Territory had the power to impose the tax in question even in the absence of the Public Salary Tax Act and the Buck Act is

of course absurd on its face and ignores completely the fundamental problem raised by this appeal.

It is quite obvious that if Congress considered that the Territory had the power to impose the tax, in the absence of the act, the direct reference to territories would have been omitted from the Buck Act. Further, if Congress had desired the Buck Act to include all persons within the geographical limits of certain areas to be included in the act, the reference to "jurisdiction" would have been omitted also. Those facts are so apparent that they are almost too evident to mention.

The problem is not whether the territory has broad powers of taxation but simply whether appellant is subject to the jurisdiction of the territory. And if he is not so subject, then neither the Public Salary Tax Act, nor the Buck Act, nor any other congressional act, can render him subject to territorial taxation upon income taxed by his domiciliary state.

As between two conflicting taxing authorities every instinct of reason, justice and practicality urges that the taxing authority of the domiciliary state should prevail.

Appellee recites *Territory v. Carter*, 19 Haw. 198 and *Cassels v. Wilder*, 23 Haw. 61, and contends that since in these two cases, two members of the armed forces were subjected to the jurisdiction of the territory, one for criminal prosecution and the other assessed a tax on a privately owned automobile that these should be considered controlling. Appellant respectfully would like to point out that these should not be considered as controlling for in a later case, *West v. West*, 35 Haw. 461, the court emphatically states:

"We think that both reason and authority support the following conclusions: (1) that an officer or enlisted man, when permitted to establish a home outside of his military or naval station, may thus acquire a domicile *but cannot acquire a domicile when required to reside in quarters furnished by the government on a military or naval station . . .*" (Emphasis added.)

West v. West, 35 Haw. 461, 472.

Even more decisive is the case of *U. S. v. Motohara*, 4 U.S. Dist. Ct. Hawaii, in which the court states:

"This phrase, 'within the exclusive jurisdiction of the United States' is well understood as applying to the crimes which are committed within the premises, grounds, forts, arsenals, navy-yards, and other places within the boundaries of a state, or even within a Territory, over which the federal government has by cession, by agreement, or by reservation exclusive jurisdiction. These cases are tried by circuit or district courts of the United States, administering the laws of the United States, and not by the courts of the State or those of the Territory."

4 U.S. Dist. Ct. Haw. p. 65, 66, quoting from *Gon-Shay-EE*, petitioner, 130 U.S. 343, 352.

Appellee correctly concludes that "Enclaves¹⁷ exist in the several states under and pursuant to Article I, Sec. 8, Cl. 17" (Appellee's brief p. 6) and under the above holding, it is respectfully urged that enclaves can also exist in territories.

In attempting to differentiate relative to the situation of military areas in territories as distinguished from those in

¹⁷ Webster's New International Dictionary, 2d ed. p. 842, defines "enclave" in its primary senses as "a tract or territory enclosed *within foreign territory*." (Underlining added.)

the states and the District of Columbia, appellee relied on the Hawaii National Park Act of April 19, 1930, which reads as follows:

“Sec. 1. That hereafter sole and exclusive jurisdiction shall be exercised by the United States over the territory which is now or may hereafter be included in the Hawaii National Park in the Territory of Hawaii, saving, however, to the Territory of Hawaii the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed outside of said park, and *saving further to the Territory of Hawaii the right to tax* persons and corporations, their franchises and property on the lands included in said park . . .” (Underlining added.)

Appellee’s Brief, p. 20, 21.

Appellant contends that if the right to tax were already inherent or established over federal areas previously or subsequently created, Congress would not feel the necessity of implicitly reserving the right of the Territory to tax persons or property in such federal area.

The question remains therefore for determination as to whether or not the military area in question is actually within the Territory of Hawaii, jurisdictionally speaking, and whether or not civilians domiciled on the mainland of the United States and living and working in this area are subject to the territorial income tax laws.

It is the contention of appellant, that simply by coming to live and work on a military reservation, a person domiciled in another state does not *ipso facto* become subject to the Territorial tax laws, and that he must place his per-

son or activity within the jurisdiction of the Territory, and in the words of the decision in the case of *Wood v. Tawes*, supra, 28 A. (2d) 850, 853:

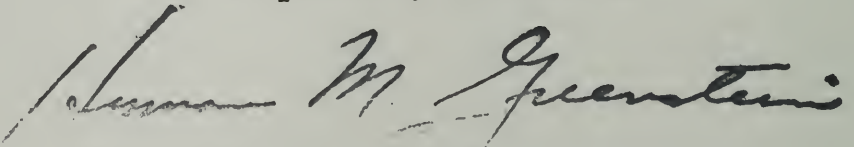
“Maintenance of a place of abode, however, must involve at least a sufficient residence within the state to bring the individual within the taxing jurisdiction, otherwise the exaction might amount to a deprivation in violation of the 14th Amendment of the United States Constitution.”

CONCLUSION

For the reasons set forth in our opening and reply briefs, it is respectfully urged that the judgment and decision appealed from should be reversed.

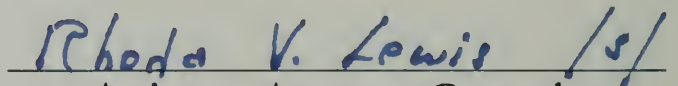
Dated at Honolulu, T. H., this 1st day of February, 1949.

Respectfully submitted,



HYMAN M. GREENSTEIN,
Attorney for Victor J. Veatch,
Appellant.

Due service and receipt of 3 copies of the within reply brief is hereby acknowledged this 4th day of February, 1949.



Assistant Attorney General,
Territory of Hawaii,

Attorney for Appellee.

No. 12037

United States
Court of Appeals
for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.
SAMUEL GOLDWYN,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

DEC 7 - 1948

PAUL P. O'BRIEN,

CLERK

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Exhibits for Petitioner—(Cont'd)

| | |
|--|-----|
| 3—Letter, Samuel Goldwyn, Inc., Ltd., by Abraham Lehr to United Artists Studio Corp., Ltd., dated June 27, 1933..... | 160 |
| Admitted in Evidence | 99 |
| 4—Letter dated June 27, 1933, addressed to United Artists Studio Corp., Ltd., signed Abraham Lehr | 161 |
| Admitted in Evidence | 99 |

Exhibits for Respondent:

| | |
|---|-----|
| A—Corporation Income Tax Return of United Artists Studio Corp. for fiscal year 1930.. | 162 |
| Admitted in Evidence | 127 |
| B—Corporation Income Tax Return for fiscal year 1931 | 169 |
| Admitted in Evidence | 127 |
| C—Corporation Income Tax Return for fiscal year 1932 | 178 |
| Admitted in Evidence | 127 |
| D—Corporation Income Tax Return for fiscal year 1933 | 186 |
| Admitted in Evidence | 127 |
| E—Tabulation Showing Balances Owing to United Artists Studio Corp. from Douglas Fairbanks (Company) | 193 |
| Admitted in Evidence | 134 |

Exhibits for Respondent—(Cont'd)

| | |
|---|-----|
| F—Tabulation Showing Balances Owning from Mary Pickford (Company) | 194 |
| Admitted in Evidence | 134 |
| G—Tabulation Showing Balances Owning from Samuel Goldwyn, Inc., Ltd. | 195 |
| Admitted in Evidence | 134 |
| H—Tabulation Showing Balances Owning from Feature Productions, Inc. | 196 |
| Admitted in Evidence | 134 |
| I—Ledger Sheet Showing Account of Samuel Goldwyn, Inc., Ltd., for certain months, 1933 | 197 |
| Admitted in Evidence | 134 |
| J—Ledger Sheet Showing Account of Mary Pickford Co. for certain months, 1933... .. | 199 |
| Admitted in Evidence | 134 |
| K—Ledger Sheet Showing Account of Fea- ture Productions, Inc., Ltd., for certain months, 1933 | 201 |
| Admitted in Evidence | 134 |
| L—Ledged Sheet Showing Account of Doug- las Fairbanks Co. for certain months, 1933 | 203 |
| Admitted in Evidence | 134 |

Joint Exhibits:

| | |
|--|-----|
| 1-A—Resolutions adopted at Special Meeting of Board of Directors of Samuel Goldwyn Studios on Nov. 30, 1942..... | 145 |
| Admitted in Evidence | 65 |
| 2-B—Minutes of Board of Directors Meeting of Sept. 11, 1930 | 149 |
| Admitted in Evidence | 65 |
| 3-C—Entries on Books of Samuel Goldwyn Studios reflecting action taken by reso- lution of Sept. 11, 1930..... | 152 |
| Admitted in Evidence | 65 |
| 4-D—Journal Entry No. 896 dated May 27, 1933, showing Transfer of Mary Pickford Fairbanks and Douglas Fairbanks Divi- dends | 153 |
| Admitted in Evidence | 92 |
| 5-E—Journal Entry No. 897, May 27, 1933, showing Transfer of Dividends Payable to Accounts Receivable | 154 |
| Admitted in Evidence | 92 |
| 6-F—Copy of General Ledger Sheet headed “Dividends Payable” Account No. 105, 1930-1943 | 156 |
| Admitted in Evidence | 92 |

Witness for Petitioner:

Ezzell, Marvin A.

| | |
|-----------------|-----|
| —direct | 65 |
| —cross | 99 |
| —redirect | 119 |
| —recross | 123 |

APPEARANCES:

For Petitioner:

FERDINAND TANNENBAUM, Esq.,
GEORGE LEWIS, Esq.,
Z. N. DIAMOND, Esq.

For Respondent:

WILLIAM A. SCHMITT, Esq.

Docket No. 8770

SAMUEL GOLDWYN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1945

July 19—Petition received and filed. Taxpayer notified. Fee paid.

July 19—Copy of petition served on General Counsel.

July 19—Request for hearing at New York City filed by taxpayer. 7/26/45 granted.

Aug. 17—Answer filed by General Counsel.

Aug. 22—Copy of answer served on taxpayer.
(New York City)

1946

Sept. 13—Hearing set November 4, 1946, in New York City.

Oct. 31—Motion for leave to file amended petition, amendment lodged, filed by taxpayer. 11/4/46 Granted.

Oct. 31—Hearing set November 4, 1946 in New York City on taxpayer's motion.

Oct. 31—Copy of motion, amended petition and notice of hearing served on General Counsel.

Nov. 4,

& 7—Hearing had before Judge Johnson on merits. Stipulation of facts filed. Motion to amend petition and amended petition; answer to amended petition; appearances of George Lewis and F. Tanenbaum, & Z. N. Diamond as counsel filed at hearing. Briefs due 12/19/46. Reply brief 1/6/47.

Nov. 25—Transcript of hearing 11/4/46 filed.

Nov. 25—Transcript of hearing 11/7/46 filed.

Dec. 5—Motion for extension to 1/3/47 to file brief, filed by General Counsel. 12/6/46 Granted as to both parties.

Dec. 31—Motion for extension to 1/17/47 to file brief, filed by taxpayer. 1/3/47 Granted.

1947

Jan. 3—Motion for extension to 2/3/47 to file brief, filed by General Counsel. 1/6/47 Granted.

Jan. 16—Brief filed by taxpayer.

1947

- Feb. 5—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 2/6/47 Granted. Copy served.
- Feb. 24—Motion for leave to file the attached memorandum reply brief, brief lodged, filed by General Counsel. 2/25/47 Granted.
- May 26—Motion to substitute photostatic copies for exhibits, filed by taxpayer. 6/12/47 Granted.
- Sept. 30—Findings of fact and opinion rendered, Judge Johnson. Decision will be entered under Rule 50. 10/2/47 Copy served.
- Oct. 24—Order amending opinion entered 9/30/47, entered.
- Oct. 31—Computation for entry of decision filed by General Counsel. Agreed to.
- Nov. 17—Decision entered. Judge Johnson. Div. 10.

1948

- Feb. 4—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.
- Feb. 10—Proof of service of notice of filing petition for review from Ferdinand Tannenbaum, Esq.
- Feb. 17—Proof of service of notice of filing petition for review from Samuel Goldwyn, taxpayer.
- Mar. 15—Certified copy of order from 9th Circuit extending time to 5/4/48 to prepare and transmit record filed.

1948

Apr. 26—Certified copy of order from 9th Circuit extending time to 6/18/48 to prepare and transmit record filed.

June 1—Certified copy of order from 9th Circuit extending time to 9/16/48 to prepare and transmit record filed.

Aug. 23—Designation of record filed by General Counsel with notice of service by mail thereon.

Aug. 30—Proof of service of designation of record from attorney for taxpayer. [2*]

Tax Court of the United States

Docket No. 8770

SAMUEL GOLDWYN,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in its notice of deficiency dated June 29, 1945 and as a basis of his proceeding, alleges as follows:

1. Petitioner is a resident of the State of Cali-

* Page numbering appearing at foot of page of original certified Transcript of Record.

fornia and resides at No. 1200 Laurel Drive, Beverly Hills, California. The return for the period here involved was filed with the Collector of Internal Revenue, Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") presumably was mailed to the petitioner on June 29, 1945. [3]

3. The taxes in controversy are income taxes for the calendar year 1943 and are in the sum of \$117,688.82.

4. The determination of deficiency is based upon the following errors:

(a) The determination that petitioner in the year 1942 received a dividend of \$239,059.58 from Samuel Goldwyn Studios instead of \$104,610.58.

(b) The determination that a distribution of \$203,091.00 by Samuel Goldwyn Studios did not reduce accumulated earnings and profits in the fiscal year ending June 30, 1931, but reduced available accumulated earnings and profits of \$68,641.98 and paid in capital of \$134,449.02, in the fiscal year ending June 30, 1933.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) Samuel Goldwyn Studios, a corporation organized under the laws of the State of California, maintained its accounts and filed its income tax returns on the accrual basis of accounting for a fiscal year ended June 30. On June 30, 1930, the earnings and profits of [4] such corporation, then known as United Artists Studio Corporation, accumulated after February 28, 1913 including earn-

ings and profits for the year ending June 30, 1930, were \$104,877.84. The net earnings and profits of such corporation for the fiscal year ending June 30, 1931 were \$181,521.58. The accumulated earnings and profits, including earnings and profits for the year ending June 30, 1931 (without diminution by reason of distribution made during the said taxable year) totaled \$286,399.42.

(b) On September 11, 1930, the Board of Directors of Samuel Goldwyn Studios declared a cash dividend of \$203,091 at the rate of \$21 a share to stockholders of record as of September 10, 1930, payable December 15, 1930. Such dividend was paid as follows: \$185,327.17 on May 27, 1933 and \$17,763.83 on June 29, 1933.

(c) On December 31, 1942 Samuel Goldwyn Studios distributed to petitioner the sum of \$800,000. At the time of such distribution the earnings and profits of such corporation accumulated after February 28, 1913, including earnings and profits for the taxable year (without diminution by reason of any distribution made during the year) totaled \$104,610.56. [5]

(d) The respondent has determined that \$239,059.58 of the amount distributed by Samuel Goldwyn Studios on December 31, 1942 constitutes a distribution from accumulated earnings and profits. Such determination results from the assumption that the distribution described in Paragraph 5(b) hereof did not reduce accumulated earnings and profits in the fiscal year ending June 30, 1931, but reduced available accumulated earnings and profits

of \$68,641.98 and paid-in capital of \$134,449.02 in the fiscal year ending June 30, 1933.

Wherefore, your petitioner prays that this Court may hear this proceeding and determine that the earnings and profits of Samuel Goldwyn Studios in the fiscal year ended June 30, 1931 should be reduced in the sum of \$203,091; that the petitioner received a dividend of \$104,610.56 instead of \$239,059.58, from Samuel Goldwyn Studios; that there is no deficiency, and for such other and further relief in the premises as this Court may deem just and proper.

Respectfully submitted,

/s/ FERDINAND TANNENBAUM,
Counsel for Petitioner. [6]

State of California,
County of Los Angeles—ss.

Samuel Goldwyn, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to these matters he believes it to be true.

Sworn to before me this 13th day of July, 1945.

/s/ (Illegible)

/s/ (Illegible)

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires February 25, 1946. [7]

EXHIBIT A

Treasury Department
Internal Revenue Service
New York 1, N. Y.

29 June 1945.

Office of Internal Revenue Agent-in-Charge,
Upper N. Y. Division,
U. S. Parcel Post Bldg.

Mr. Samuel Goldwyn,
1270 Sixth Avenue,
New York 20, N. Y.

Dear Mr. Goldwyn:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1943, discloses a deficiency of \$117,688.82, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, 341 Ninth Avenue, New York 1, N. Y., for the attention of: UNY:CONF:JKH. The signing and fil-

ing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

By DANIEL A. BOLICH,
Internal Revenue Agt. in
Charge.

Enclosures: Statement, Form of Waiver. [8]

STATEMENT

Tax Liability for the Taxable Year Ended
December 31, 1943

| | Liability | Assessed and/or Withheld | Deficiency |
|------------|----------------|-----------------------------|--------------|
| Income Tax | \$2,546,609.98 | \$2,428,921.16* | \$117,688.82 |

* See tax computation schedule for details.

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated April 22, 1944; to the supplemental report of examination dated February 6, 1945; and to the statement of adjustments (a copy of which was transmitted to you on June 13, 1945.)

Taxable Year Ended December 31, 1942**Adjustments to Net Income**

| | | |
|--|-----------------|-----------------|
| Net income as disclosed by return..... | \$ 3,590,628.87 | |
| Unallowable deductions and additional income | | |
| (a) Dividends | \$ 239,059.58 | |
| (b) Net gain from sale or ex- change of capital assets..... | 1,023,219.40 | 1,262,278.98 |
| Net income adjusted..... | | \$ 4,852,907.85 |

Taxable Year Ended December 31, 1942**Explanation of Adjustments**

(a) Of the total dividend of \$800,000.00 paid to you by Samuel Goldwyn Studios, the amount of \$239,059.58 is held to constitute taxable income. Inasmuch as you excluded the entire dividend received as an alleged return of capital, your net income has been increased by \$239,059.58.

(b) You reported a net gain from the sale or exchange of capital assets of \$3,564,558.65, whereas an examination discloses that you derived a recognized gain of \$4,587,778.05, the details of which were previously submitted to you on May 27, 1944, and February 23, 1945. You have previously agreed to this adjustment, an increase of \$1,023,219.40 in net income.

Computation of Alternative Tax

| | |
|---------------------------------------|-----------------|
| Net income adjusted | \$ 4,852,907.85 |
| Minus: Net long-term gain | 4,572,669.43 |
| Ordinary net income..... | 280,238.42 |
| Surtax net income | 280,238.42 |
| Less: Earned income credit..... | 1,400.00 |
| <hr/> | |
| Net income subject to normal tax..... | \$ 278,838.42 |
| Normal tax at 6% on \$278,838.42..... | \$ 16,730.31 |
| Surtax on \$280,238.42 | 204,935.50 |
| <hr/> | |
| Partial tax | \$ 221,665.81 |
| Plus: 50% of net long-term gain..... | 2,286,334.72 |
| <hr/> | |
| Alternative tax | \$ 2,508,000.53 |

Taxable Year Ended December 31, 1942

Computation of Tax

| | |
|---|-----------------|
| Net income adjusted | \$ 4,852,907.85 |
| Surtax net income | 4,852,907.85 |
| Less: Earned income credit..... | 1,400.00 |
| <hr/> | |
| Net income subject to normal tax..... | \$ 4,851,507.85 |
| Normal tax at 6% on \$4,851,507.85..... | 291,090.47 |
| Surtax on \$4,852,907.85 | 3,954,524.44 |
| <hr/> | |
| Total tax (ordinary tax)..... | \$ 4,245,614.91 |
| Total tax (alternative tax)..... | 2,508,000.53 |
| Correct income tax liability | 2,508,000.53 |

No assessment of the tax for the year 1942 has been made due to the forgiveness feature of the Current Tax Payment Act of 1943 and the above amount has been considered in the determination of the tax due for the year ended December 31, 1943.

Taxable Year Ended December 31, 1943

Adjustments to Net Income

| | Income Tax Net Income | Victory Tax Net Income |
|---|--------------------------|---------------------------|
| Net income as disclosed by return..... | \$176,304.83 | \$492,827.93 |
| Unallowable deductions and additional income | | |
| (a) Net profit from business..... | 966.10 | 966.10 |
| (b) Contributions | | 8,922.00 |
| Net income adjusted..... | <u>\$177,270.93</u> | <u>\$502,716.03</u> |

Taxable Year Ended December 31, 1943

Explanation of Adjustments

(a) In determining your net profit from business, you deducted \$1,922.47 as depreciation on equipment, whereas an examination discloses that you sustained depreciation of \$956.37, the details of which were previously submitted to you under date of May 27, 1944. The difference of \$966.10 has, therefore, been disallowed as a deduction. You have previously agreed to this adjustment.

(b) You deducted contributions of \$8,922.00 in computing your net profit from business. It is held that such contributions do not constitute an allowable deduction in computing your victory tax net income. You have previously agreed to this adjustment.

Computation of Income and Victory Tax

| | | |
|---|--------------|----------------|
| Income tax net income..... | | \$177,270.93 |
| Less: | | |
| Personal exemption | \$1,200.00 | |
| Credit for dependents | 350.00 | 1,550.00 |
| | | <hr/> |
| Balance (surtax net income)..... | | \$175,720.93 |
| Less: Earned income credit..... | | 1,400.00 |
| | | <hr/> |
| Net income subject to normal tax..... | | \$174,320.93 |
| Normal tax at 6% on \$174,320.93..... | | 10,459.26 |
| Surtax on \$175,720.93 | | 119,473.95 |
| | | <hr/> |
| Total income tax | | \$129,933.21 |
| Victory tax net income..... | \$502,716.03 | |
| Less: Specific exemption | 624.00 | |
| | | <hr/> |
| Income subject to victory tax | \$502,092.03 | |
| Victory tax before credit: | | |
| 5% of \$502,092.03 | 25,104.60 | |
| Less: Victory tax credit..... | 600.00 | |
| | | <hr/> |
| Net victory tax | | \$ 24,504.60 |
| | | <hr/> |
| Net income tax and victory tax..... | (a) \$ | 154,437.81 |
| Income tax for 1942..... | (b) | 2,508,000.53 |
| Amount of (a) or (b) whichever is larger..... | | 2,508,000.53 |
| Forgiveness feature: | | |
| Amount of (a) or (b) whichever is smaller | \$154,437.81 | |
| Amount forgiven ($\frac{3}{4}$ of \$154,437.81) | 115,828.36 | *38,609.45 |
| | | <hr/> |
| Total income and victory tax liability..... | | \$2,546,609.98 |
| * Amount forgiven. | | |

Less :

| | | |
|---|--------------|-----------------|
| Income and victory tax withheld by employer | \$ 4,913.80 | |
| Income tax paid on 1942 income..... | 897,425.42 | |
| Income tax paid on 1943 income on account of declaration of esti- mated tax | 894,968.52 | |
| Income tax assessed on 1943 returns: | | |
| Orig'l acct. No. | | |
| 301214 | \$ 35,818.82 | |
| Add'l acct. No. 519011, | | |
| July 7, 1944 list..... | 584,301.01 | |
| Add'l acct. No. 519008, | | |
| Apr. 27, 1945 list.... | 11,493.59 | |
| | <hr/> | 631,613.42 |
| | <hr/> | \$ 2,428,921.16 |
| Deficiency | | <hr/> |
| | | \$ 117,688.82 |

[Endorsed]: T.C.U.S. Filed July 19, 1945. [14]

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, through his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition heretofore filed in this proceeding, admits, denies and avers as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that notice of deficiency (a copy of which is attached to the petition and marked Exhibit "A") was mailed to the petitioner on June

29, 1945, but denies the remaining allegations of paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1943 and are in the sum of \$117,688.82.

4. (a) and (b). Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. (a). Admits the allegations of the first sentence of subparagraph (a) of paragraph 5 of the petition, but denies the remaining allegations of subparagraph (a) of paragraph 5 of the petition.

5. (b). Admits the allegations of fact contained in subparagraph (b) of paragraph 5 of the petition.

5. (c). Admits that in December, 1942, Samuel Goldwyn Studios distributed to petitioner the sum of \$800,000, but denies the remaining allegations of subparagraph (c) of paragraph 5 of the petition.

5. (d). Admits that respondent has determined that \$239,059.58 of the amount distributed by Samuel Goldwyn Studios in December, 1942 constitutes a distribution from accumulated earnings and profits, but denies the remaining allegations of the first sentence of subparagraph (d) of paragraph 5 of the petition. In respect to the remaining allegations of subparagraph (d) of paragraph 5 of the petition, respondent avers that same are neither pertinent nor competent in regard to the issues

involved, and that he is not called upon to either affirm or deny said allegations.

Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved and the appeal denied.

/s/ J. P. WENCHEL,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

E. C. ALGIRE,
Division Counsel,
WILLIAM A. SCHMITT,
Special Attorney, Bureau of
Internal Revenue.

WAS:lmw 8-11-45 [16]

[Title of Tax Court and Cause.]

AMENDED PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in its notice of deficiency dated June 29, 1945 and as a basis of his proceeding, alleges as follows:

1. Petitioner is a resident of the State of California and resides at No. 1200 Laurel Drive, Beverly Hills, California. The return for the period

here involved was filed with the Collector of Internal Revenue, Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") presumably was mailed to the petitioner on June 29, 1945. [17]

3. The taxes in controversy are income taxes for the calendar year 1943 and are in the sum of \$117,688.82.

4. The determination of deficiency is based upon the following errors:

(a) The determination that petitioner in the year 1942 received a dividend of \$239,059.58 from Samuel Goldwyn Studios instead of \$104,610.58.

(b) The determination that a distribution of \$203,091.00 by Samuel Goldwyn Studios did not reduce accumulated earnings and profits in the fiscal year ending June 30, 1931, but reduced available accumulated earnings and profits of \$68,641.98 and paid-in capital of \$134,449.02, in the fiscal year ending June 30, 1933.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) Samuel Goldwyn Studios, a corporation organized under the laws of the State of California, maintained its accounts and filed its income tax returns on the accrual basis of accounting for a fiscal year ended June 30. On June 30, 1929, the earnings and profits of such corporation, then known as United Artists Studio Corporation, Ltd., accumulated after February 28, 1913 including earnings and profits for [18] the year ending June 30, 1929, were \$104,877.84. The net earnings and prof-

its of such corporation for the fiscal year ending June 30, 1930 were \$181,521.58. The accumulated earnings and profits, including earnings and profits for the year ending June 30, 1930 (without diminution by reason of distribution made during the said taxable year) totaled \$285,399.42.

(b) On September 11, 1930, the Board of Directors of Samuel Goldwyn Studios, then known as United Artists Studio Corporation, Ltd., declared a cash dividend of \$203,091.00 at the rate of \$21.00 a share to stockholders of record as of September 10, 1930, payable December 15, 1930. Such dividend was distributed to the stockholders on September 17, 1930.

(c) On December 31, 1942 Samuel Goldwyn Studios distributed to petitioner the sum of \$800,000. At the time of such distribution the earnings and profits of such corporation accumulated after February 28, 1913, including earnings and profits for the taxable year (without diminution by reason of any distribution made during the year) totaled \$104,610.56.

(d) The respondent has determined that \$239,059.58 of the amount distributed by Samuel Goldwyn Studios on [19] December 31, 1942 constitutes a distribution from accumulated earnings and profits. Such determination results from the assumption that the distribution described in Paragraph 5 (b) hereof did not reduce accumulated earnings and profits in the fiscal year ending June 30, 1931, but reduced available accumulated earnings and profits of \$68,641.98 and paid-in capital of \$134,449.02 in the fiscal year ending June 30, 1933.

Wherefore, your petitioner prays that this Court may hear this proceeding and determine that the earnings and profits of Samuel Goldwyn Studios in the fiscal year ended June 30, 1931 should be reduced in the sum of \$203,091; that the petitioner received a dividend of \$104,610.56 instead of \$239,059.58, from Samuel Goldwyn Studios; that there is no deficiency, and for such other and further relief in the premises as this Court may deem just and proper.

Respectfully submitted,

/s/ FERDINAND TANNENBAUM,
Counsel for Petitioner.

(Duly Verified.)

[Clerk's Note: This exhibit has already been reproduced as Exhibit A on pages 7-15 and for economy is not here reproduced.]

[Endorsed]: T.C.U.S. Filed Nov. 4, 1946. [20]

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition heretofore filed in this proceeding, admits, denies, and avers as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.
2. Admits that the notice of deficiency (a copy

of which is attached to the amended petition and marked Exhibit A) was mailed to the petitioner on June 29, 1945, but denies the remaining allegations contained in paragraph 2 of the amended petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1943 and are in the sum of \$117,688.82.

4(a) and (b). Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the amended petition.

5(a). Admits the allegations of the first sentence of subparagraph (a) of paragraph 5 of the amended petition, but denies the remaining allegations of subparagraph (a) of paragraph 5 of the amended petition. [28]

5(b). Admits the allegations contained in the first sentence of subparagraph (b) of paragraph 5 of the amended petition. Admits that such dividend was distributed, but avers that it was distributed in May, 1933, and denies that it was distributed on September 17, 1930, as alleged in the last sentence of subparagraph (b) of paragraph 5 of the amended petition.

5(c). Admits that in December, 1942, Samuel Goldwyn Studios distributed to petitioner the sum of \$800,000, but denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the amended petition.

5(d). Admits that respondent has determined that \$239,059.58 of the amount distributed by Samuel Goldwyn Studios in December, 1942, constitutes a distribution from accumulated earnings and prof-

its, but denies the remaining allegations of the first sentence of subparagraph (d) of paragraph 5 of the amended petition. In respect of the remaining allegations of subparagraph (d) of paragraph 5 of the amended petition, respondent avers that same are neither pertinent nor competent in regard to the issues here involved, and that he is not called upon to either affirm or deny said allegations.

6. Denies generally and specifically each and every allegation of the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved and the appeal denied.

J. P. WENCHEL,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

E. C. ALGIRE,
Division Counsel,

WILLIAM A. SCHMITT,
Special Attorney, Bureau of
Internal Revenue.

[Endorsed]: T.C.U.S. Filed Nov. 7, 1946. [29]

9 T. C. No. 71

The Tax Court of the United States

Samuel Goldwyn, Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket No. 8770. Promulgated September 30, 1947.

Corporation X on September 11, 1930, declared a dividend payable December 15, 1930, which was charged to surplus and credited to a Dividends Payable account, in which appeared the amount due each shareholder. There was no crediting to the shareholders' individual accounts until 1933 when on their instructions most of the dividend was applied to their debts to the corporation. In the fiscal year ended June 30, 1931, the corporation had accumulated earnings and profits sufficient to pay the dividend; in 1933 it did not. In 1942 it made a distribution in redemption of shares, and computed earnings to reflect a reduction of surplus in 1931 by the amount of the dividend.

1. The corporation's surplus, held, reduced in the fiscal year 1931 by virtue of the declaration of the dividend.

2. The crediting and control exercised by the shareholders over the dividend, held, to have effected a distribution in the fiscal year 1931, which a fortiori reduced surplus.

Ferdinand Tannenbaum, Esq., Z. N. Diamond, Esq., and George Lewis, Esq., for the petitioner.

William A. Schmitt, Esq., for the respondent.

The Commissioner determined a deficiency of \$117,688.82 in petitioner's income tax for 1943 in

part by adding to income reported for 1942 a portion of a dividend which petitioner had excluded as a return of capital. The parties have stipulated two amounts representing the portion taxable as a distribution of earnings and profits according to whether the distribution of a prior dividend reduced earnings and profits in the fiscal year 1931 or 1933. Petitioner contends that the declaration of the dividend, the charging of it to surplus and the crediting of it to Dividends Payable in the fiscal year 1931 reduced its surplus in 1931; respondent argues that no distribution occurred until the dividend was credited on the shareholders' indebtedness to the corporation in 1933, and that because of this surplus was not reduced in 1931.

FINDINGS OF FACT

Petitioner, an individual residing in Beverly Hills, California, filed his income tax returns for 1942 and 1943 with the collector of internal revenue for the sixth district of California. For many years he has been actively engaged in the motion picture industry, and on December 14, 1942, became owner of all the outstanding shares of Samuel Goldwyn Studios, a California corporation (hereinafter called Studios). Prior to that time and on November 30, 1942, Studios' board of directors had resolved to reduce the par value of its capital stock by \$386,840 from \$483,550 to \$96,710, represented by shares of a par value of \$10 each to be exchanged for the outstanding shares of a par value of \$50 each, and had further resolved to distribute \$800,000 to shareholders out of surplus, then amounting

to \$870,390. Pursuant to this resolution Studios distributed \$800,000 to petitioner on December 31, 1942.

Studios was organized in 1926 by Joseph M. Schenck, Mary Pickford and Douglas Fairbanks, and was originally known as United Artists Studio Corporation. It acquired 18 acres of land in Hollywood, California; erected on it office buildings, stages and other structures which it [31] equipped for the production of motion pictures on a large scale, and engaged in the rental of these facilities to producers of pictures, principally its own shareholders. In 1930 it was controlled by Feature Productions, Inc., which owned 66 per cent of its outstanding shares and had agreed to purchase 23 per cent more. All shareholders were represented on Studios' board of directors and took an active part in its affairs. They were billed weekly for use of the facilities and for services and materials furnished, and made payment when Studios needed funds. For each shareholder a running account was maintained on the books, reflecting debit and credit entries. Studios and Feature Productions, Inc., had the same manager, and the officers and directors of both comprised largely the same individuals.

Studios maintained its accounts and filed its income tax returns on an accrual basis for a fiscal year ended June 30th. On June 30, 1930, its earnings and profits accumulated since February 28, 1913, amounted to \$286,399.42, of which \$181,521.28 were earnings and profits for the fiscal year 1930. On September 11, 1930, the board of directors:

Resolved that a cash dividend of Twenty One Dollars (\$21.00) per share be, and the same hereby is, declared to all shareholders of this corporation of record as of September 10, 1930, and that said dividend be paid on December 15, 1930.

Resolved Further that the treasurer of this corporation be, and he hereby is, authorized and instructed to give notice of such dividend and to pay the same when due.

Pursuant to this resolution an entry of even date was made in the corporation's journal, debiting surplus with \$203,091 (as corrected later by a reversing entry which eliminated \$1,565.67 erroneously credited to Samuel Goldwyn, Inc., Ltd.), and crediting each of the 12 shareholders with his [32] proportionate share of the amount declared as a dividend. The individuals' shares were likewise credited in the ledger to an account styled Dividends Payable. The amounts so entered in the journal and in the Dividends Payable account of the ledger as credits to the shareholders individually, however, were not credited in their individual running accounts with the corporation, and hence the balances in the latter did not reflect the dividend credits. Of the 12 shareholders 7 nominally held 1 qualifying share each on account of another, and 1 was a corporation of Mary Pickford and Douglas Fairbanks. On September 17 and December 15, 1930, the net indebtedness of the shareholders to Studios was \$85,865.06 and \$90,818.87, respectively, distributed as follows:

| | Sept. 17, 1930 | Dec. 15, 1930 |
|--------------------------------------|----------------|---------------|
| Feature Productions Inc., debit..... | \$ 4,133.41 | \$83,986.05 |
| Douglas Fairbanks, credit | 5,143.19 | 2,459.27 |
| Mary Pickford Fairbanks, debit..... | 21,913.27 | 1,324.69 |
| Samuel Goldwyn, Inc., debit..... | 64,961.57 | 3,948.86 |

The amounts of the shareholders' indebtedness to Studios varied greatly from time to time. Prior to June, 1933, the maximum indebtedness of Feature Productions was \$240,783.44 on February 18, 1933; of Mary Pickford \$40,471 on December 31, 1932; of Samuel Goldwyn, Inc., \$116,299.98 on January 14, 1933; of Douglas Fairbanks \$22,644.12 on July 23, 1932.

On Studios' income tax return for the fiscal year 1931, the dividend was reported as declared on September 10, 1930, but unpaid at the end of the year, and the amount was shown under "Other Liabilities" as "Dividends Payable." During the fiscal years ended June 30, 1931, 1932 and 1933 the corporation sustained statutory net losses of \$97,-650.97, \$28,475.54 and \$101,349.36, respectively. Cash payment of the dividend declared in 1930 [33] was not made, but on June 27, 1933, Feature Productions, Inc., instructed the corporation by letter to apply to its indebtedness to the corporation \$136,327.17, to which the dividend declaration entitled it, and \$28,000 of the dividend due to Mary Pickford and Douglas Fairbanks who had assigned this part to it. On the same date shareholders Samuel Goldwyn, Inc., and Abraham Lehr similarly directed that \$20,979 and \$21 of the dividend due to them respectively, likewise be applied on debts to the corporation. By journal entries dated

May 27, 1933, the Dividends Payable account was debited with \$203,091, and credits were entered as follows:

Accounts Receivable

| | |
|--------------------------------|--------------|
| Feature Prod., Inc., Ltd..... | \$164,327.17 |
| Samuel Goldwyn, Inc., Ltd..... | 21,000.00 |
| Mary Pickford Fairbanks | 6,649.87 |
| Douglas Fairbanks | 5,695.03 |

Accounts Payable

| | |
|-------------------------------|-------------|
| Mary Pickford Fairbanks | \$ 2,232.05 |
| Douglas Fairbanks | 3,186.88 |

\$203,091.00

Explanation: To charge Accounts Receivable from stockholders against adjusted Dividends Payable to them and to credit any excess of dividends over such receivables to Accounts Payable. This entry per instructions of A. M. Brentinger. [manager]

An appropriate journal entry likewise recorded the assignment to Samuel Goldwyn, Inc., of \$28,000 of dividends due Mary Pickford and Douglas Fairbanks "leaving amount due last two named \$17,763.83." Only entries relating to this transfer were entered in the ledger account Dividends Payable. A credit balance of \$203,091 appears in the account prior to the fiscal year 1933; there is no balance as of the end of that year. Under date of May 27, 1933, Studios sent a notice to Feature Productions, Inc., [34] that its account had been credited with \$164,327.17 "amount of dividend due you" and sent a like notice of a credit of \$21,000 to Samuel Goldwyn, Inc.

On its income tax return for the fiscal year 1933 Studios reported as a liability at the beginning of the year dividends payable of \$203,091; at the end

of the year, none. Mary Pickford and Douglas Fairbanks reported receipt of the dividends in their income tax returns for 1933, attaching notes explanatory of the assignment of the \$28,000 to Feature Productions, Inc. In its consolidated return for 1931 Art Cinema Corporation, of which Feature Productions, Inc., was a subsidiary, reported receipt of the dividend of \$136,327.17.

In his income tax return for 1942 petitioner reported the dividend of \$800,000 paid to him by Studios as a return of capital. The Commissioner determined that \$239,059.58 constituted taxable income. The parties have stipulated that such amount was a distribution of accumulated earnings and profits if accumulated earnings and profits and paid-in capital of the corporation were reduced by the dividend of \$203,091 in the fiscal year ended June 30, 1933, but if accumulated earnings and profits were reduced by the dividend in the fiscal year ended June 30, 1931, then only \$104,610.56 of the \$800,000 dividend of 1942 constituted a distribution of earnings and profits.

Distribution of the dividend declared September 11, 1930, was made in the fiscal year ended June 30, 1931, and Studios' accumulated earnings and profits were reduced by the amount of it in that year. Of the dividend of \$800,000 received by petitioner in 1942 \$104,610.56 constituted a distribution of earnings and profits. [35]

OPINION

Johnson, Judge: Petitioner, as sole shareholder of Studios, received in 1942 a dividend of \$800,000. The parties are agreed that \$104,610.56 of this

amount were earnings and profits if the dividend of \$203,091, declared September 11, 1930, reduced Studios' accumulated earnings and profits in the fiscal year ended June 30, 1931, and that \$239,059.58 thereof were earnings and profits if, as the Commissioner determined, the prior dividend reduced accumulated earnings, profits and paid-in capital in the fiscal year ended June 30, 1933. Studios, be it noted, had more than ample earnings and profits in the fiscal year 1931 to pay the dividend in full, but subsequent losses had reduced this accumulation by June, 1933. As a consequence the amount of earnings and profits available in 1942 for payment of the \$800,000 dividend depends upon the amount absorbed by the prior dividend, and that in turn depends upon whether the prior dividend reduced earnings and profits in the fiscal year 1931 or in the fiscal year 1933.

Contending that distribution occurred in the fiscal year 1931, petitioner stresses that pursuant to the declaration of September 11, 1930, the amount of the dividend was charged to surplus; apportioned among the several shareholders, and individually credited to them on the corporate books; that consistently Studios reported the amount on its income tax return for 1931 as "Dividends Payable," and even if the shareholders be deemed to have postponed distribution by their failure to withdraw, still the declaration vested them with a right to it which of itself reduced the corporate surplus. Respondent argues to the contrary that

the dividend was not distributed until 1933; was reported by shareholders as received [36] in 1933, and that time of actual payment fixes the date on which the corporate earnings and profits are reduced, as was held in *Emily D. Proctor*, 11 B.T.A. 235, and cases therein cited.

It was recognized in the *Proctor* case that:

* * * as between a stockholder and a corporation, the declaration of a dividend brings into existence the status of a debtor and creditor, and the earnings and profits of the corporation to the extent of such a declaration are separate from the other property of the corporation. *United States v. Guinzburg*; *supra* [278 Fed. 363]; *Plant v. Walsh*, *supra* [280 Fed. 722]; and *Appeal of A. H. Stange*, *supra* [1 B.T.A. 810].

This rule has been applied in holdings that a corporation's invested capital is reduced by the amount of a dividend declared, *Gregg Co., Ltd.*, 25 B.T.A. 81; *Belmont Iron Works*, 9 B.T.A. 216; *W. E. Caldwell Co.*, 6 B.T.A. 47, even in the form of promissory notes, *R. E. Burdick*, 24 B.T.A. 1297, and that until payment the amount of a declared dividend is borrowed capital owed to the shareholders, *Bulger Block Coal Co.*, 71 Ct. Cl. 636; 48 Fed. (2d 675. The law of California here applicable conforms to the general rule, and was succinctly stated in *Smith v. Taecker*, 133 Cal. App. 351; 24 Pac. (2d) 182, as follows:

* * * the mere declaration of a dividend creates debts against the corporation in favor of the stockholders as individuals. Where the resolution declares a dividend on a future date, title to said dividend vests in the stockholder on the date fixed in the resolution.

From this it follows that in the fiscal year 1931 Studios became legally bound to pay the declared dividend of \$203,091 to its shareholders; that this amount could no longer be listed among its assets but represented an indebtedness, and that surplus was thereby decreased. The evidence discloses that recognition was given by appropriate book entries to these consequences: the surplus account was debited with the amount and a corresponding [37] credit was entered in a liability account styled Dividends Payable, on which the part of the total dividend due to each shareholder was individually indicated.

Respondent argues nonetheless that the date of payment or distribution to the shareholders fixes the year in which surplus was decreased, and because there was no transfer of the amounts due the several shareholders from the Dividends Payable account to their respective individual accounts until the fiscal year 1933, he insists that the latter year is the year of distribution and hence the year in which surplus was reduced under *Mason v. Routzahn*, 275 U. S. 175, and *United States v. Phillips*, (C.C.A. 3rd Cir.), 24 Fed. (2d) 195, as construed in the Proctor opinion, *supra*. In con-

sidering this argument we stress as of crucial significance that those cases involve the liability of the recipient shareholder for tax on a dividend and not the effect of the declaration or payment on the corporation's own financial structure. We accept as settled that "the date of payment, not the date of the declaration of the dividend, is the date of distribution", *Mason v. Routzahn*, *supra*. But assuming arguendo that the shareholders did not receive the dividend until the corporation's fiscal year 1933, we do not regard as applicable to the issue in this case the rule that a shareholder, whether on the cash or accrual basis, is not to be treated as receiving a dividend until his existing right to it has been satisfied by payment, actual or constructive. That rule is one of convenience rather than of strict law, as was pointed out by the Seventh Circuit Court of Appeals in *Commissioner v. American Light & Traction Co.*, 156 Fed. (2d) 398, holding a shareholder on an accrual basis taxable in 1937 on a dividend actually paid in 1937 although his absolute right to it had [38] ripened in 1936 by virtue of the declaration. And while the Board of Tax Appeals in the *Proctor* case, *supra*, treated a special dividend as paid from available surplus although a regular dividend, previously declared but unpaid, would have absorbed such surplus, it expressly recognized that the declaration brought into existence the relation of debtor to the shareholders, as appears from the above quoted excerpt, and then reasoned:

* * * we think it beside the point that the corporation may for a profit and loss statement or accounting purposes, or as showing the status existing between the corporation and its shareholders, show its earnings and profits to be reduced by a declaration of a dividend not then paid. The dividend declared must give way to the dividend paid in so far as the taxability of the same in the hands of the stockholders is concerned. It is to tax that which is first distributed by payment rather than declaration that the statute seeks to and does reach. [Underscoring supplied].

In this proceeding, however, we are not concerned with the taxability of the dividend declared on September 11, 1930, in the hands of the stockholders, but only with the effect of that dividend on corporate surplus. In the fiscal year 1931 the amount of it was properly charged against surplus; this charge remained unreversed thereafter, and whatever may have been the correct year for taxing the dividend to the stockholders, we are of opinion and hold that the accumulated earnings and profits of Studios were reduced in the fiscal year 1931 by the declared dividend of \$203,091.

In reaching the foregoing conclusion, we have assumed *arguendo* that the dividend declared on September 11, 1930, was not distributed until the fiscal year 1933, as respondent argues and petitioner denies. A close review of the facts established convinces us not only that surplus was re-

duced but also that the shareholders received the dividend in the fiscal year 1931, and the decision reached is thus fortified. By the declaration, the dividend was payable on December 15, 1930; surplus was charged with the amount as of [39] the date of the declaration, and each shareholder's part was credited individually in the Dividends Payable account. Although the shareholders were indebted to Studios and the balances in their accounts varied frequently, there was no transfer to their individual accounts until June 27, 1933, when they directed the corporation by letter to credit a part to the debts, and the remainder was then credited for the first time to their individual accounts. Respondent argues that only then a distribution was made whereby the corporate earnings and profits were reduced. He stresses that December 15, 1930, has no significance "because absolutely nothing was done by anybody on that date," not even a crediting of the dividend to the shareholders' individual accounts. It is equally true, however, that nothing was done from September 11, 1930, date of the declaration, until June 27, 1933, when the shareholders directed the disposition to be made of the dividends, and among such directions, which were immediately carried out, was an assignment of \$28,000 of the dividend due Mary Pickford and Douglas Fairbanks for application to the debt of Feature Productions, Inc. Obviously on June 27, 1933, the shareholders had over the dividends an unqualified control which the corporation recog-

nized, and if "nothing was done" after the entries made at the time of the declaration, we must assume that the shareholders had the same absolute control in the fiscal year 1931 that they had in the fiscal year 1933.

A dividend credited to a shareholder and unqualifiedly subject to his command is taxable to him as distributed in the year of the credit whether or not actually withdrawn, *Baker v. United States*, 84 Ct. Cl. 428; 17 Fed. Supp. 976; *Jacobus v. United States*, 80 Ct. Cl. 357; 9 Fed. Supp. 41; *Hadley v. Commissioner* (D. C. App.), 36 Fed. (2d) 543; *Brooks v. Commissioner* [40] (C.C.A., 4th Cir.), 35 Fed. (2d) 178; *E. Gordon Perry*, 28 B.T.A. 497; cf. *Avery v. Commissioner*, 292 U. S. 210, for a shareholder "cannot postpone his income taxes by leaving his dividend with his corporation." *A. D. Saenger, Inc. v. Commissioner* C.C.A., 5th Cir., 84 Fed (2d) 23; certiorari denied, 299 U. S. 577. And although the shareholders here erroneously reported the dividend on their income tax returns for 1933, such treatment by them is immaterial to the issue, *Valley Lumber Company of Lodi*, 43 B.T.A. 423; the corporation, on the contrary, properly listed it as a liability in its return for the fiscal year 1931. Payments by credit have been held sufficient to support the corporation's claim for a dividends paid credit, *Valley Lumber Company of Lodi*, *supra*; *Atlantic Land Co.*, 43 B.T.A. 74; *Valley Tractor & Equipment Co.*, 42 B. T.A. 311.

* * * The test in such cases is whether the right of the stockholder has so matured as to subject the dividend credited on the corporation's books to the complete control of the stockholder and remove it from the control of the corporation. Whenever that test is satisfied, the book credit is regarded as the equivalent of cash and constitutes payment of the dividend. * * * [R. H. Bouligny, Inc., 45 B.T. A. 456].

We are of opinion that the test has been satisfied by the crediting of the dividend to the shareholders on September 11, 1930, and as it was payable on December 15, 1930, the shareholders had complete control from that date, as is apparent from their directed disposition of the dividend in 1933 without further corporate action. The distribution, therefore, was made in the fiscal year ended June 30, 1931, and a fortiori the corporate surplus was then reduced.

In accordance with the stipulation we find that \$104,610.56 of the dividend of \$800,000 received by petitioner in 1942 constituted a distribution of earnings and profits.

Reviewed by the Court.

Decision will be entered under Rule 50.

Hill, J. dissents. [41]

Disney, J., dissenting: The majority view has two bases: First, it is held that the declaration of a dividend in 1930 and debit thereof to surplus on the corporation's journal created the relation

of debtor and creditor between the corporation and the stockholders, and decreased the surplus; that, therefore, the stockholder, for purposes of the question here, may be considered as receiving the dividend though there has been no payment, either actual or constructive, that the cases requiring such payment, actual or constructive, apply only to questions of taxability of the dividend in the hands of the stockholders, and not here, where the question is to effect of the dividend on corporate surplus, and that the dividend declared in 1930 reduced the accumulated earnings and profits. Second, it is held, in the alternative, that in fact there was constructive receipt of the dividend by the stockholders, the dividend declared having been entered on the corporation's "dividend payable" account on the corporate ledger, where each stockholder's proportionate part was credited in his name, although the amounts shown in journal and ledger as credits to the shareholders individually, were not credited in their individual running accounts with the corporation. (Each shareholder had a running account, reflecting debit and credit entries and the amounts of shareholder's indebtedness to the corporation varied greatly, but the dividend was not reflected on such accounts.)

I think it clear beyond controversy that the alternative basis of decision is without foundation. Quoting *Valley Tractor & Equipment Co.*, 42 B. T.A. 311, the majority opinion recognizes that the test is complete control by the stockholder over the

dividend, and removal of control from the corporation. It is obvious that the corporation had not lost, nor the [42] stockholder acquired, control over the dividend. Credit to "dividends payable" on the corporate books transferred no more control to the stockholder than an entry of "bills payable" or "notes payable" transfers control to the payee. The matter is solely that of intra-corporation book-keeping. Logically, a showing is required that the stockholder could get his money at any time without possibility of denial by the corporation. This is indicated by the cases relied on by the majority. In the Valley Tractor case checks were issued to the shareholders. In Valley Lumber Company of Lodi, 43 B.T.A. 423, it was shown that the dividend was credited to the individual accounts of the shareholders and that on such accounts none of the stockholders was indebted to the corporation. In Atlantic Land Co., 43 B.T.A. 74, the dividend was credited to the stockholders "without restrictions as to withdrawals," and the stockholders were informed by the president that the dividend was available to any shareholder who desired to receive it forthwith, and that the amounts would be credited to each without restrictions as to withdrawals. In R. H. Bouligny, Inc., 45 B.T.A. 456, cited by the Valley Tractor case, the dividend was immediately credited to the personal accounts of the stockholders "who thereupon had the unrestricted right to withdraw the same." The personal accounts had been maintained for a long time and the practice

had been to credit thereto and for the stockholders to make withdrawals as they needed money or the financial condition of the corporation permitted. In my opinion, it is just such a showing that is necessary to establish constructive receipt of a dividend, and such showing is wholly absent here. The [43] stockholders had no control whatever over the "dividends payable" account. The fact that their names appeared thereon is of no import. In so far as the majority opinion relies on constructive receipt of dividend, I regard it altogether erroneous.

Primarily, however, the majority are of the view that the declaration of the dividend "vested them [the stockholders] with a right to it which of itself reduced the corporate surplus." I can subscribe to no such idea. Under section 115(c) of the Internal Revenue Code, a dividend is a "distribution" out of earnings and profits; therefore, until the earnings and profits are distributed, they remain as such, available for future distribution. The term means "division or apportionment among several or many," and synonymous are: apportionment, allotment, dispensation, disposal, dispersion, classification, arrangement—Webster's New International Dictionary. To me the above does not permit us to consider a declaration of dividend, accompanied merely by bookkeeping entries reducing surplus, as a distribution of earnings and profits. In no real sense were they distributed. To so hold is to give more bookkeeping entries weight which is nowhere else accorded to them. Real facts, not bookkeeping

entries, control the determination of taxable income. *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179; *B. F. Goodrich Co.*, 1 T.C. 1098. We held in *F. J. Young Corp.*, 35 B.T.A. 860; *affd.*, 103 Fed. (2d) 137 that book entries transferring surplus to a no-par stock account in order to increase the stated value did not diminish the corporate earnings or profits available for dividends, saying in part: "The book entries took nothing from the corporation and gave nothing to the stockholders." Surely the same is true here. In [44] *Inland Development Co. v. Commission*, 120 Fed. (2d) 986, the directors of a corporation resolved that a dividend be declared and an entry was made on the corporate books charging the earned surplus account with \$53,125 and crediting that amount to the account of the sole stockholder, which on its books credited dividends received. The court said, "The nomenclature of the Board of Directors did not determine the essence or nature of the action taken. Calling it a dividend did not make it so." It was held that the transaction was not a dividend, but a sale of oil. In *J. W. Thompson*, 10 B.T.A. 390, a charge was made to surplus to cover a purchase made by the sole stockholder of a corporation. It was held that despite such charge and the designation as dividend in the return, there was no dividend. In *Pullman, Inc.*, 8 T.C. 292, we said that the fact that a corporation treated a distribution as from capital, rather than from earnings and profits, as to which no change was shown, was not controlling on the question

as to whether there was the equivalent of a distribution of a taxable dividend.

That bookkeeping, and particularly entries as to surplus, etc., in connection with dividends and the present question, is not determinative, seems to me well and definitely settled in *Edwards v. Douglas*, 269 U. S. 204. Construing section 31(b), added by section 1211 of the Revenue Act of 1917, as to corporate distributions from undivided profits or surplus, the Court said:

Congress did not use the words "surplus account" or "undivided profits account." Its language is "undivided profits or surplus."

* * *

Later, referring to Congress and its intent: [45]

* * * Its general aim was clearly to make the dividends, in whatever year paid, bear the tax rate of the year in which the profits of which it was a distribution had been earned, and for this purpose to treat as a unit the profits of the whole tax year. In providing measures for the attainment of that aim, it could be of no practical significance whether, at the time of the payment of the dividend, these profits appeared in a surplus or undivided profits account (as the profits earned within part of a year would, where a corporation closed its books monthly, quarterly, or semi-annually) or whether they still rested as current earnings without formal determination or specific allocation.

I think, therefore, the debit to surplus on the corporate journal is greatly outweighed by the majority view.

That declaration of a dividend is not sufficient for purposes of dividends paid credit is not subject to question. There must be actual or constructive receipt by the stockholder. Why should the rule be different when the question is whether earnings and profits have been distributed? One section, 27, says the dividend must be "paid"; the other, 115(a), says there must be "distribution." A difference seems to be based, I think, not on fact or effect, but upon mere words. We have, moreover, not limited the requirement that there be more than declaration of dividend to "dividends paid credit" cases. In *Korfund Co., Inc.*, 1 T. C. 1180, the question was whether a stockholder was taxable in 1928, when it was resolved that the net surplus be distributed in proportion to stock (with an agreement among the stockholders that the surplus be not withdrawn for four years), or in 1938, when the money was received. We held that the income was taxable in 1938, that mere declaration of dividend does not give rise to taxable income, commenting, *inter alia*, that funds were not set aside, that (as here) surplus was not credited to the stockholders on their accounts, that the dividend was not subject to the unqualified demand of the stockholders, and [46] that the corporation exercised control over the funds. Here, it is clear, either that, as in the *Korfund* case, the stockholders vol-

untarily permitted the surplus to remain with the corporation, or that they could not do otherwise, having no control. In either case, under the Korfund case they would not be taxable until paid. Why adopt a different rule for purposes of saying that when the corporation distributed—to affect the taxability to the stockholder of distributed amounts? That, indeed, is the final question both here and in the Korfund case. Moreover, it is clear that here, as in the cited case, there was exercise of control by the corporation over the funds. Though on the journal there was debit to surplus, the corporation never went so far as to credit the amount to stockholders running drawing accounts, on which apparently there were constant entries, certainly debit and credit entries, and the amounts of stockholders' indebtedness to corporation "varied greatly from time to time." Thus, the corporation kept control as much as in Korfund. On the books for 1930 the amount was merely "payable," and on the income tax return for 1931 the amount was shown under "other liabilities" as "dividends payable." Such records effectually, in my view, nullify any possible effect from a debit to surplus, for they show that in fact there was no segregation of amounts of earnings involved, in the corporate fisc, let alone a "distribution * * * out of" earnings and profits—as section 115(a) requires. That declaration of dividend effects a relation of debtor and creditor, between corporation and shareholder, can not meet the "distribution" and "out of" earn-

ings test. In *Hadley v. Commissioner*, 36 Fed. (2d) 543, we again note that mere declaration is not held sufficient—in a case not involving dividends paid [47] credit: for there it was held that within section 201(a) of the Revenue Act of 1918 [the precursor of, and in the same language, so far as here pertinent, as section 115(a)], a mere declaration of dividend, without setting aside funds for payment, can not constitute either dividend or distribution, and that, without a declaration, if corporate earnings are credited to the account and unqualified control of the stockholders, there was such distribution as caused taxation of the amounts as income. The case shows the over-importance which is ascribed to mere declaration or debit to surplus by the majority opinion here. The important element is distribution, and we see control by stockholder, through unqualified credit to his account, again recognized as the test of taxability. The same question is ours here; the test of taxability. The same question is ours here; the test should be the same.

In *Lawrence v. Commissioner*, 143 Fed. (2d) 456, the court applied the test of absolute right of withdrawal of funds, on the same question and situation here presented, i. e., as to effect of declared dividend on diminishing corporate earnings and profits. The direct question was whether income from a dividend paid in 1937 was taxable or nontaxable because from paid-in surplus. This depended upon whether the amounts had in 1913-

1917 been distributed as dividends and then paid back into paid-in surplus, or whether, instead, the funds had never left the corporation and were therefore paid from earned surplus, and therefore as dividends, in 1937. During these years, 1913-1917, the amount of the earnings was declared as dividend, but there was not actual payment. Though the amounts were placed to the credit of the various stockholders on the books of the corporation, from which withdrawals were made [48] [the stockholders here had no such credits, no such control], the court considered from the evidence that the declarations were not regarded as “terminating the corporation’s control over the money,” and that the so-called dividends “were not unqualifiedly made subject to the demand of the shareholders so as to be income to them when placed to their credit on the books”; therefore the Circuit Court affirmed the Tax Court in holding that there had been no distribution in 1913-1917, so that there was taxable distribution from earnings in 1937. The point is that the court made the test, not declaration of dividend, but termination of corporation control over the funds by unqualified subjection to stockholders’ demand, and not the test primarily adopted by the majority here—creation of relation of debtor and creditor by dividend declaration. There was such declaration and creation of creditor-debtor relation in the cited case. The conclusion there can not stand with the majority opinion here. Mark that the question, as here, was whether pre-

vious alleged distributions had sufficed to diminish earnings available for dividends. If the test of unqualified control by stockholder was there properly applied, we must see that here the stockholders with no credit to their drawing accounts, and, just as in the cited case, not receiving the money, are in a weaker position in contending that there was distribution.

I have not considered it necessary to reiterate what has been said in *Emily D. Proctor*, 11 B.T.A. 235; *Mason v. Routzahn*, 275 U. S. 175, and *United States v. Phillips*, 24 Fed. (2d) 195, on the subject, which I regard as decisive of this question contrary to the majority view, for the reason that they hold that date of payment, not declaration of dividend, determines [49] taxability, therefore, here our question is merely whether under the decided cases there was something amounting to payment. Under such cases there was not. I dissent.

Black, Harron, and Oppen, JJ., agree with this dissent. [50]

The Tax Court of the United States
Washington

Docket No. 8770

SAMUEL GOLDWYN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

For good cause shown of record, it is

Ordered that the last sentence in the first full paragraph on page 6 of the Opinion in the above-entitled proceeding, promulgated September 30, 1947, and reported in 9 T. C., reading:

“In its consolidated return for 1933 Art Cinema Corporation, of which Feature Productions, Inc., was a subsidiary, reported receipt of the dividend of \$136,327.17.”

be deleted and that there be substituted in lieu thereof the following:

“In its consolidated return for 1931 Art Cinema Corporation, of which Feature Productions, Inc., was a subsidiary, reported receipt of the dividend of \$136,327.17.”

/s/ BOLON B. TURNER,
Judge.

Dated October 24, 1947.

[51]

The Tax Court of the United States
Washington

Docket No. 8770

SAMUEL GOLDWYN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Findings of Fact and Opinion, promulgated September 30, 1947, the parties herein having filed a computation of tax on October 31, 1947, it is

Ordered and Decided: That there is no deficiency in income and victory tax for the calendar year 1943.

Entered November 17, 1947.

[52]

(Seal) /s/ LUTHER A. JOHNSON,
Judge.

Tax Court of the United States

Docket No. 8770

SAMUEL GOLDWYN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Courtroom 5050, Grand Central Terminal Bldg.,
70 East 45th Street, New York, N. Y.,

November 4, 1946, 2 p.m.

Met pursuant to notice.

Before: Luther A. Johnson, Judge.

Appearances: Ferdinand Tannenbaum, Esq., Z. N. Diamond, Esq., and George Lewis, Esq., 20 Exchange Place, New York City, N. Y., appearing for petitioner. William A. Schmitt, appearing for respondent. [55]

PROCEEDINGS

The Clerk: Docket No. 8770, Samuel Goldwyn.

The Court: State your appearances for the record.

Mr. Tannenbaum: Ferdinand Tannenbaum, Z. N. Diamond, George Lewis, appearing for petitioners.

Mr. Schmitt: William A. Schmitt, for respondent.

The Court: You may proceed.

Mr. Diamond: If your Honor please, this case involves a deficiency in income tax in the amount of \$117,688.18 for the taxable year ended December 31, 1943.

The tax liability arises from the Commissioner's treatment of a distribution made in the year 1942, in the sum of \$800,000.

The Commissioner's position and the taxpayer's position varies on one point, which is as to what portion of that distribution, admittedly made in 1942 in the amount of \$800,000, represents a distribution of earnings and profits and what portion of that distribution represents a return of capital.

We have stipulated for the Court what the alternative amounts would be, in the event the Court makes findings which I will go into in just a moment, so that there won't be any evidence required in order to compute earnings and profits as of any particular period. [56]

The question of how much of the distribution of \$800,000 represents a distribution of earnings and profits of the distributing corporation and how much represents in effect a return of capital to the respective distributees depends, in its turn, upon the effect on the earnings and profits of the distributing corporation, which is United Artists Studios Corporation, of a prior distribution made pursuant to a declaration of a dividend in September of 1930.

The position of the petitioner is that this declaration of a dividend, made in 1930, in September,

1930, made payable on December 15, 1930, in effect reduced in the year 1930 the amount of earnings and profits of the corporation at a point of time not later than the payable date.

In other words, petitioner's position is based upon what we conceive to be the classical effect on the earnings and the profits of the corporation, of the declaration of a dividend.

We say that when that dividend was declared in September, 1930, made payable to stockholders of record on September 10, 1930, the dividend declaration having been made on September 11, 1930, the dividend being made payable pursuant to the resolution of the corporation on December 15, 1930—we say that the effect of that [57] dividend was to segregate out of the earnings and profits of the corporation the amount of that dividend declaration, that at that time the corporation had in effect changed the relationship between itself and its stockholders in so far as that dividend was concerned, from that of a stockholder and a corporation to a creditor and a debtor, in the amount of the declaration; that if that corporation had tried to rescind that dividend declaration at some later date it could not have done so.

We say that as a result of that fact the dividend declaration of September 11, 1930, reduced available earnings and profits of the distributing corporation—that is, the declaring corporation—at a period of time not later than the 15th of December, 1930, when the dividend was, by its terms, made payable.

We say in addition to that, that if as a matter of law that position be not sustained, if it be held that the actual date of payment to the stockholder is the controlling date so far as the reduction of earnings and profits is concerned, then we say that the dividend was actually paid at a date not later than December 15, 1930, and we will introduce evidence to show that fact.

And that, in essence, your Honor, I think is the issue here. In other words, the taxability of the 1942 distribution depends on the effect on the earnings [58] and profits of the 1930 dividend.

The Court: Counsel for respondent?

Mr. Schmitt: This is not a very complicated case, your Honor, from a factual point of view, and counsel for petitioner has, in his statement of the position which petitioner will take, pretty well covered what the issue is.

Of course, the respondent takes the view that the amount of earnings and profits available for a dividend is determined as of the date of payment, rather than the date of declaration.

Factually, the situation is this, that on September 11 a declaration was made by this corporation—

The Court: You mean September 11, 1930?

Mr. Schmitt: 1930—payable to stockholders of record on September 10, 1930, payable on December 15, 1930.

As a matter of fact, we think the evidence will show that notwithstanding this declaration fixing

a specific time for payment, the dividend was not paid until 1933.

The Court: Will there be any evidence of any payment made on December 15, 1930, of dividends?

Mr. Schmitt: There will be no direct evidence that there was any payment made on December 15, 1930. [59]

I do not know what implications or what conclusions counsel may draw in that respect. We do not think that there was any payment, any receipt by the stockholders, either actual or constructive, in 1930. The only time that they received anything was in 1933.

The Court: 1933 or 1943?

Mr. Schmitt: 1933.

I might say that in 1942, if your Honor please, \$800,000 was distributed to the instant taxpayer, and it is to trace these accumulated earnings or profits back during these years, 1930 and 1933, that gives rise to the tax in question.

The tax in the deficiency, however, is 1943. But 1942, the income when adjusted, being greater than the income in 1943, it is really what happened in 1942 that counts in this controversy, although the deficiency will be 1943.

We have some of the facts stipulated, and others will be subject to proof and some documentary exhibits.

Mr. Diamond: If your Honor please, at this time I should like to offer on behalf of petitioner and respondent stipulation of facts.

The Court: It will be received and marked as an exhibit.

Mr. Diamond: If your Honor please, there is [60] one procedural matter that I would like to have disposed of before we start with our testimony.

We filed an amended petition—I believe it was on October 23—changing the original petition in one material respect.

That amended petition was sent to the Tax Court with a motion asking leave to file.

I understand that motion has not yet been disposed of.

The Court: Is there any objection to the motion being granted?

Mr. Schmitt: I would like to see the motion.

If your Honor please, I understand that it came into the office this morning, in my absence, and I have not seen it. I would like to see it just to refresh myself at this juncture. I was anticipating receiving it before this.

(The Clerk hands document to Mr. Schmitt.)

Mr. Schmitt: I am sorry to delay the Court on this.

The Court: That is all right.

Mr. Schmitt: Counsel, what was that change? Could you point it out for me?

(Mr. Diamond complies with Mr. Schmitt's request.) [61]

Mr. Schmitt: That is the only change?

Mr. Diamond: That is the only change.

Mr. Schmitt: If your Honor please, the other day counsel at a conference we had in his office showed me the proposed amendment that he was going to make, and I saw it at that time. But I did not have a chance to study it thoroughly and I did not do more than casually read it.

I notice now, as I glance over it, and in view of the opening statement by counsel for petitioner, a new light has come into the picture, a new aspect, a new angle, and I do not want to agree to this amendment.

The original petition, if your Honor please, on page 3, paragraph 5, subparagraph B reads as follows:

“On September 11, 1930, the board of directors of Samuel Goldwyn Studios declared a cash dividend of \$203,091 at the rate of \$21 a share to stockholders of record as of September 10, 1930, payable December 15, 1930. Such dividend was paid as follows:

“\$185,327.17 on May 27, 1933.

“\$17,763.83 on June 29, 1933.”

The proposed amendment, paragraph 5-B, the first sentence thereof, is the same.

The second one makes this substitution: [62]

“Such dividend was distributed to the stockholders on September 17, 1930.”

The first one, as your Honor will note, said that the dividend was paid on those respective dates. Now this one comes along and purports to make

a change and use the word “distributed” on that latter date, 1933.

There may be some legal effects and conclusions to be drawn from the difference in wording there, the word “paid” on the one hand, and the other word “distributed” on the other.

For that reason, especially at this stage of the proceeding, I do not know just what proof counsel will attempt to present.

For instance, the stipulation as we have filed it has a gap in there inasmuch as no reference is made in the stipulation, it being a partial stipulation, to the mechanics of what was done with this \$203,000 odd. That was to be supplied by proof, and if the admissions of the pleadings, the petition and the answer are stricken out, which said they were paid, it might be, depending upon the proof or lack of proof or failure to prove on the part of the petitioner—the burden might be passed to the respondent to fill in that gap.

The Court: I do not think the pleadings should be amended so as to shift the burden. I do not see any [63] special reason for it.

Yet, at the same time, I think petitioner ought to have the right to see that no injustice is done to it.

Mr. Schmitt: We have, if your Honor please, only filed a partial stipulation here.

The Court: I think if the motion should be granted to amend the pleadings—would it eliminate the suggestion you made with reference to

prejudice to the respondent if he should be permitted to amend his answers to conform to the amended pleadings of the petitioner? Could your interests be taken care of in that way?

Mr. Schmitt: I think that would take care of it, if your Honor please; if I enter a general denial.

The Court: In other words, I think respondent should have the right to see that the answers be amended to meet the amended pleadings of the petitioner.

Mr. Schmitt: I do not know, if your Honor please, what my particular rights are in the premises.

Here we have an allegation in the petition and an admission in the answer. Whether that has crystallized that particular issue or not, or whether they can unscramble the eggs—

The Court: I think the change in the pleadings would eliminate any crystallization. [64] I think if they do amend, your rights should be protected, too.

Mr. Diamond: If your Honor please, I think I might clear it up by saying this, that the only change made in the amended petition is to change the recited date of payment, of distribution of this dividend, from 1933 to 1930.

We discovered, in the course of negotiations, in stipulations and in the course of developing evidence to fit in, to see whether we could prove certain allegations that we wanted to that actual payment was made, according to our interpretation of the facts, in 1930.

I looked at the petition and saw that we had pleaded there that payment had been made in 1933, although I think counsel is in error in stating that it was admitted.

I do not believe it was. I think it was denied.

Mr. Schmitt: I have the answer here.

Mr. Diamond: I do not think it makes any difference, your Honor.

The Court: What about the question that counsel for respondent raised, that instead of "paid" you used the word "distributed"? Did you attach any significance to that?

Mr. Diamond: I did not at the time, your [65] Honor. I merely felt that the word "distributed" was more correct technically, because the Internal Revenue Code uses the word "distributed."

The Court: You mean you thought it would be more accurate?

Mr. Diamond: That is correct. So I thought the only thing for me to do was to amend the petition to make it conform to the pleadings.

Mr. Schmitt: There is more than that. The amendment says, "Such dividend was distributed," and so forth; and the petition, "Such dividend was paid in 1933."

That is quite a material difference. It is a difference not only of three years, but of meaning.

Mr. Diamond: I do not predicate any distinction on the use of the word "distributed," your Honor, and as far as Mr. Schmitt is concerned I am perfectly content to use either term.

The Court: And you do not undertake to shift the burden?

Mr. Diamond: No, sir; merely that we have to prove that the distribution was made in 1930.

The Court: I think the pleadings should not be changed, except by consent of counsel.

Mr. Schmitt: My denial of the new allegation [66] of 1930 would not change the situation in respect of 1933. I still would have to go forward with proving that 1933 distribution or payment. That is the difference there, if your Honor please. Denial will not solve that situation.

The Court: I am not entirely familiar with the rules in reference to making pleadings, but would amendment of the pleadings leave you in the same situation, so that your rights would be the same?

Mr. Schmitt: No, sir. If I had denied the original and no attempt was made to change it, they would have to go forward and prove the 1933 payment or distribution.

The Court: Is there any way, through agreement of counsel, by which that can be done under the rules?

Mr. Diamond: If your Honor please, I am not quite clear on what Mr. Schmitt is basing his objection on.

We determined, in the course of preparing for trial, that our 1933 allegation of payment was incorrect. We determined, under our interpretation of facts, that 1930 was the date of payment.

I would think that I would have the right to

make that amendment at any time prior to the trial without in any way affecting the Government's rights. In other words, if I think I have incorrectly pleaded the facts, I [67] think almost as a matter of course this Court has traditionally permitted counsel to make the change.

The Court: Rule 17 provides that:

“The petitioner may, as of course, amend his petition at any time before answer is filed. After answer is filed a petition may be amended only by consent of the Commissioner or on leave of the Court.”

What the Court is trying to find out is whether or not, in exercise of its discretion in permitting filing of the amendment, it can be done in such a way as not to prejudice the rights of respondent or whether respondent by agreement or consent of petitioner's counsel could restore the original—

Mr. Diamond: Does your Honor mean by that that I have to bear the burden of proving what I think is wrong?

Mr. Schmitt: No, but I think that you should bring in the factual data, the documentary proof; the journals, letters, ledgers or whatever they are, which we both know exist and which neither one of us denies, and that would make your case.

You could put any interpretation on those documents, ledgers, minutes and so forth, as you wish. But I do not want to have it come in and bring it in myself, [68] because that is not my original burden.

Mr. Diamond: We have it here, your Honor. All the evidence as to which Mr. Schmitt would be interested is here in court today.

The only thing I am trying to get clear is whether Mr. Schmitt wants me to bear the burden of proving a fact which I think is incorrect and as to which I have asked that my pleadings be amended.

The Court: You think there was an error on your pleadings originally?

Mr. Diamond: Yes, sir. That is correct.

Mr. Schmitt: I do not want to refer to the evidence in advance, but there are certain incidents in the regular course of business, in the journal and ledger, which would show the mechanics which were done in 1933, and counsel has furnished me with photostats after showing me the originals of said documents.

The conclusion to be drawn from those entries on the books, which may or may not show that it was 1930 that was intended rather than 1933—or they ipso facto might show that.

But I still want those entries, and I think the Court is entitled to the whole picture.

The Court: As I understand it, they will all be offered by the— [69]

Mr. Schmitt: By the petitioner.

Mr. Diamond: No, sir. That is one of the things I wanted to get clear.

So far as we are concerned, the evidence is pretty much the same as it has been up to now. The facts

that are contained in the stipulation of facts are basically what we rely on, with additional oral testimony which we are going to adduce this afternoon.

Looking at those facts, however, as they appear in the stipulation, we have determined that as a matter of evidence the evidence shows that the correct date of payment is not 1933 but 1930.

In that posture of the case I thought that I had a right to conform my pleadings to the proof. After all, the pleadings are not evidence. The proof is the thing that counts with the Court, and I did not want to go to this Court with an allegation of payment in 1933 and then tender to this court evidence of payment in 1930.

If that is correct, if I was wrong in my original allegation as to payment in 1933 I would think that I would have the right to conform my pleadings to the proof that I am about to make.

If that is true I do not think Mr. Schmitt has the right to say to me that I have entered into a contract [70] with the Government to keep that original allegation in my pleadings, and that if I take it out I have to support with evidence what I think is the right allegation.

The Court: If your pleadings would show 1933 and your proof 1930, there would be a variance.

Mr. Diamond: Yes, sir.

The Court: So it is necessary for you to conform the pleadings to the proof. But it was your oversight and neglect to that originally.

Now, if you did it as of this date, why couldn't it be considered as of this date as if you had done it right originally?

Mr. Diamond: If your Honor please, we have all the evidence that Mr. Schmitt would need to prove the 1933 date if he thinks that date is material. I do not think it is.

Mr. Schmitt: If your Honor please, this issue cannot be tried before this Court without all of these book entries coming into the record. I do not care whether it is petitioner's side or respondent's side. It would not be fair to this Court for the journal and ledger entries in 1933 to be withheld from the Court.

The question is who is going to present those. It is the integral part of the same transaction, regardless of what interpretation is put on it. [71]

Who is going to present that?

In the original petition and answer that burden was on the petitioner. He alleged, and respondent admitted.

Now he wants to switch that around at the eleventh hour and offer these things to the respondent to make it the respondent's burden.

I will make this suggestion, because I do know that it is absolutely necessary for your Honor to have this evidence. You could not render a decision without having this factual data.

We might agree to put it in as a joint exhibit.

The Court: Could that be done?

Mr. Diamond: I do not agree with counsel, in saying you have got to have that to make a decision.

We say the payment was made in 1930. If that is true then the deficiency has to be expunged to give effect to that.

If we had originally in our petition pleaded 1930 that would have been our original pleading. I take it counsel could not have made me prove, by my evidence and witnesses a different day.

And today he is trying to put me in that position.

The Court: I do not see that there is so much [72] importance in the question of who offers the testimony. It strikes me that that is a matter the Court will have to control.

Mr. Schmitt: I was just going to say that your Honor might reserve the ruling of the Court on this and we will go ahead on it, and then you can make that ruling.

The Court: Yes, we will go ahead.

Mr. Schmitt: The issue now is on the motion to amend.

The Court: Yes.

Mr. Schmitt: To which the respondent objects.

Mr. Diamond: Let me see if I can do this, your Honor.

I think that basically we get down to certain entries made in 1933. We have those entries here in court. We could not agree on a stipulation in respect to the conclusions to be drawn from those entries.

I think it would be perfectly all right if Mr. Schmitt's concept of that issue is pretty much the same as mine, to offer those entries into evidence as a joint exhibit.

The Court: All right, that will be offered by both parties without prejudice.

Mr. Schmitt: And I would like for my objection to this to be ruled on.

(Documents referred to were marked Joint Exhibits 1-A to 3-A and received in evidence.)

[Joint Exhibits 1-A to 3-A are set out in full at page 145 of this printed record.]

The Court: With the understanding that that exhibit will be offered as a joint exhibit I will grant the motion to amend.

Mr. Schmitt: And I wish also to record then a general denial by the respondent, if your Honor please.

The Court: Counsel for respondent will be granted the Court's permission to amend his answer to conform with the amended pleadings.

Mr. Diamond: May I call my first witness, your Honor?

The Court: Yes.

Mr. Diamond: Mr. Ezzell.

MARVIN A. EZZELL,

called as a witness in behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: State your name for the record, please.

The Witness: Marvin A. Ezzell, E-z-z-e-l-l.

By Mr. Diamond:

Q. Mr. Ezzell, what is your present occupation?

My present occupation is that of vice president of Samuel Goldwyn Productions, Inc., and general manager of Samuel Goldwyn Studios, formerly known as United [74] Artists Studio Corporation, Ltd.

(Testimony of Marvin A. Ezzell.)

Q. Will you state what your occupation was prior to your present capacities?

A. Commencing with January, 1932, I was auditor for United Artists Studio Corporation, Ltd., and thereafter and successively I was business manager, executive manager and general manager of that concern.

Prior to 1932 I was auditor for Feature Productions, Inc., Ltd., and prior to being auditor of that company I was assistant auditor.

I became auditor of that company in September, 1929.

Q. Is it correct to say that from at least 1929 to the present time you have been considerably active in the motion picture industry?

A. Yes.

Q. Are you familiar with the production end of that industry? A. Completely, I think.

Q. You referred to United Artists Studio Corporation—

Mr. Diamond: I think I might point out to your Honor at this time that that is the name of the declaring corporation; that is, the corporation that declared the dividend upon which we are here at issue. [75]

By Mr. Diamond:

Q. Has that corporation—

The Court: Was that the predecessor corporation of the petitioner corporation?

Mr. Diamond: Yes. It was then known as United Artists Studio Corporation.

(Testimony of Marvin A. Ezzell.)

The Court: When was the name changed; in 1932?

By Mr. Diamond:

Q. When was the name changed from United Artists Studio Corporation to Samuel Goldwyn Corporation, Mr. Ezzell?

A. To the best of my recollection in 1939.

The Court: And the present corporation did not come into being until 1939?

The Witness: At the present time the business of that corporation is not operated as a corporation.

The Court: The name is that of an individual, isn't it?

Mr. Diamond: I believe that is being operated by Mr. Goldwyn as an individual, your Honor.

The Court: He is the petitioner in the case as an individual?

Mr. Diamond: Yes, he is.

The Court: Is he the sole shareholder? [76]

Mr. Diamond: I do not know.

By Mr. Diamond:

Q. Could you answer that, Mr. Ezzell?

A. Is he the sole shareholder of what?

Q. Of Samuel Goldwyn Studios.

A. It is not a corporation. It is a firm name, doing business under the style and firm name of Samuel Goldwyn.

The Court: Is the other firm you mentioned; is that a corporation?

The Witness: Samuel Goldwyn Studios, the California corporation, was dissolved.

(Testimony of Marvin A. Ezzell.)

The Court: When was it dissolved?

The Witness: In 1944.

Mr. Diamond: We stipulated, your Honor, that December 14, 1942, petitioner became the owner of all the outstanding capital stock of Samuel Goldwyn Studios, which is the same as the United Artists.

The Court: One is the successor of the other?

Mr. Diamond: That is right; successor in name.

By Mr. Diamond:

Q. Mr. Ezzell, when we talk about "Studios," Samuel Goldwyn Studios and studios of United Artists Corporation, what do we mean? Could you tell us what the [77] physical layout of this corporation has been from 1930 to this time?

A. Physically it consists of approximately an area of 18 acres, and on the land there existed, in 1930—

Mr. Schmitt: May I interrupt you, please?

If your Honor please, I object to this line of testimony. I do not think it is material to the issue.

I do not wish to interrupt continuously—

The Court: I think the Court wants to get the entire picture of this situation. This is, as I understand, just introductory in the issue involved.

Objection overruled.

A. (Continuing): In 1930, on the particular land in question, there existed seven—

The Court: Where is this land located?

The Witness: This land is located in Hollywood, California.

(Testimony of Marvin A. Ezzell.)

A. (Continuing): —there existed seven so-called stages, having an aggregate square footage of approximately 100,000 square feet, along which motion pictures are photographed. These are soundproofed stages.

There also existed several office buildings, cutting rooms for cutting film, projection rooms for viewing film, a still department for developing still photographs, a sound recording building, a plaster shop, [78] blacksmith shop, electrical shop, paint shop, carpenter shop or mill, property shop for the manufacture of various properties, makeup, hairdressing departments and facilities for manufacturing wardrobe, storing and issuing wardrobe, garages and practically everything incidental to a small manufacturing enterprise manufacturing sets and equipment of all kinds necessary in the production of motion pictures, together with vaults for storage of film and cameras and other equipment.

There were also, I believe I mentioned, several office buildings housing the personnel of the studio company and housing the personnel of the customers of the studio company who produce pictures on its premises.

Subsequent to 1930 there was erected an additional stage, having an area of about 28,000 square feet, and also an additional office and dressing room structure, together with numerous smaller structures, all of which exist today.

By Mr. Diamond:

Q. Mr. Ezzell, I think you stated that you be-

(Testimony of Marvin A. Ezzell.)

came auditor for Feature Products. Did you state the date on which you became auditor for Feature Productions?

A. I think in September, 1929.

Q. And what was the relationship between Feature Productions and United Artists Studio? [79]

A. It was a dual relationship. Feature Productions was a controlling stockholder of United Artists Studio Corporation, Ltd., and was also a tenant of United Artists Studio Corporation, Ltd., leasing space and facilities and equipment from United Artists Studio Corporation, Ltd., for use by itself in the production of motion pictures which it produced.

Q. Was your answer given with respect to the year 1930? A. Yes.

Q. Where were their offices located?

A. The offices of Feature Productions, Inc., Ltd., were located in an office building on the premises of United Artists Studio Corporation, Ltd.

Q. Was that on the premises of the studio that you just described? A. Yes.

Q. Where did you perform your duties in 1930?

A. I performed my duties in an office in the building occupied by Feature Productions, Inc.

Q. Could you tell us how much stock Feature Productions owned in United Artists Studio Corporation, Ltd., in 1930?

A. In 1930 Feature Productions owned 6491.77 shares and an agreement to purchase an additional 2179.23 [80] shares, owning, itself, outright about 66 per cent of the outstanding common capital stock, and having under agreement to purchase ap-

(Testimony of Marvin A. Ezzell.)

proximately 23 per cent of the outstanding stock, an aggregate of about 90 per cent.

Q. Who were the stockholders of Feature Productions? A. Art Cinema Corporation.

Q. Could you tell us what the activities of Feature Productions were in 1930?

A. In 1930 Feature Products was engaged solely in the business of producing motion pictures.

Mr. Schmitt: If your Honor please, I again wish to object.

The Court: I think we had better get all the data, though I think we are going too much into detail.

Mr. Diamond: If your Honor please, if you will, I would like you to bear in mind the fact that on September 17, 1930, we say that what was done by United Artists Studio Corporation, Ltd., constituted payment or the distribution of the dividends to the stockholders.

The Court: All right, go ahead.

By Mr. Diamond:

Q. In what business was United Artists Studio Corporation, Ltd., engaged in 1930?

A. In the business of owning and maintaining and [81] operating a so-called rental or service studio, supplying space, equipment, facilities, labor and personnel to producers of motion pictures, primarily to its stockholder-producers.

Q. You say that it rented its studio facilities to its stockholder-producers? A. That is right.

Q. Could you tell us on what basis the rentals were fixed?

A. At the beginning of each fiscal year of the

(Testimony of Marvin A. Ezzell.)

studio corporation a forecast was made of the probable amount and number of pictures, measured in terms of photographing days and physical requirements of the pictures and a statement was made of the probable income to be expected from that volume of production.

Mr. Schmitt: Your Honor, I do not want to appear captious, but the basis for the rental between these various tenants, I think, is going too far afield for the lawsuit involved.

The Court: What is the relevancy of the question just asked?

Mr. Diamond: I want to show the nature of the distributing corporation, your Honor, in 1930, the relationship between the corporation and its stockholders at that time, the sources of its income, its activities and [82] vis-a-vis of those of its stockholders.

In other words, I want to show your Honor that as a matter of fact this was a co-operative enterprise run by the stockholders in effect, so that the stockholders produced motion pictures, and they used the facilities of United Artists Corporation.

I think that fact is highly important in my development of the case, that in the circumstances of what happened on September 17, 1930, there was in effect a payment of that dividend to the stockholders.

I think that becomes highly important in any case.

The Court: Go ahead. The Court overrules the objection.

Mr. Schmitt: Your Honor, do you wish me to

(Testimony of Marvin A. Ezzell.)

object further, or will you consider that I have made these objections?

The Court: Yes.

A. Stated briefly, the rates were set in such fashion as to take care of the overhead and expense of the corporation, allow a reasonable return of approximately 7 per cent on the invested capital, provide for amortization and depreciation and build up some surplus.

By Mr. Diamond:

Q. Did the stockholders of United Artists Studio [83] Corporation, Ltd., have first call on its facilities? A. They did.

Q. In 1930 who would you say were the main lessees?

A. Feature Productions, Inc., Ltd., and Samuel Goldwyn, Inc., Ltd.

Mr. Schmitt: Would you mind repeating that question?

Mr. Diamond: In 1930 who would you say were the main lessees of United Artists Studio Corporation, Ltd.

The answer was, Samuel Goldwyn, Inc., Ltd., and Feature Productions, Inc., Ltd.

Mr. Schmitt: If your Honor please, I object to that.

Q. This witness has not shown that he had any official capacity with United Artists Studios until 1932, and he is attempting here to testify about the internal business affairs of this corporation in 1930.

The Court: The witness was connected with one of these concerns in 1929?

(Testimony of Marvin A. Ezzell.)

Mr. Diamond: Yes.

Mr. Schmitt: That is the Feature Productions.

Mr. Diamond: The witness testified, I think, your Honor, that he was auditor for the controlling stockholder of the distributing corporation in 1930, that he performed his functions on the studio lot.

The Court: If he knows, he can testify. Cross examination can develop it further.

If you do know, say so.

By Mr. Diamond:

Q. Mr. Ezzell, in the answers you have given me so far, have they been based upon your own knowledge? A. Yes.

Q. In your own knowledge which of the two corporations that you mentioned used the facilities of the studios more in 1930?

A. Feature Productions, Inc., Ltd.

Q. Could you tell us if you know how United Artists Studio Corporation, Ltd., acquired the facilities that it rented to its stockholders? In other words, how did it acquire the studio?

A. United Artists Studio Corporation, Ltd., acquired in 1926, the year of its incorporation, the facilities—the premises and facilities which previously had been owned and operated as Pickford-Fairbanks Studios Company. They acquired the land under a leasehold arrangement and acquired the existing buildings, other structures and equipment under purchase agreement for which payment was made by stock of the United Artists Studio Corporation, Ltd.

(Testimony of Marvin A. Ezzell.)

It was formed by Joseph M. Schenck, Mary [85] Pickford and Douglas Fairbanks, who were then distributing their pictures through United Artists Studio Corporation, Ltd., primarily as a place for the production of their pictures.

Q. Mr. Ezzell, I show you joint Exhibit 2-B—
Mr. Diamond: This is attached to the stipulation, your Honor.

By Mr. Diamond:

Q. (Continuing): —of the stipulation filed by the parties, and ask you who A. M. Brentinger was.

A. A. M. Brentinger was vice-president and general manager of United Artists Studio Corporation, Ltd., and general manager of Feature Productions, Inc., Ltd.

Q. Will you also identify Abraham Lehr?

A. Abraham Lehr was—A. M. Brentinger was also a director of United Artists Studio Corporation, Ltd. Abraham Lehr was a director of United Artists Studio Corporation, Ltd. He was also vice-president, a director and acting general manager of Samuel Goldwyn, Inc., Ltd.

Q. Who was Mark Feiler?

A. Mark Feiler was a director of United Artists Studio Corporation, Ltd. and was related to Joseph M. Schenk.

Q. I think you testified that Schenk was a director of—you have not testified as to Mr. Schenk. Suppose [86] you tell us who Mr. Schenk was?

A. Mr. Schenk was president of Art Cinema Corporation, the parent company of Feature Productions, Inc.

(Testimony of Marvin A. Ezzell.)

The Court: These names appear in the documents here?

Mr. Diamond: They appear in the minutes of the United Artists.

By Mr. Diamond:

Q. Is that Joseph M. Schenk, about whom you testified?

A. Joseph M. Schenk was also a director of United Artists Studio Corporation, Ltd.

Q. Who was N. A. McKay?

A. N. A. McKay was a director of United Artists Studio Corporation, Ltd., and business manager for Mary Pickford Fairbanks.

Q. Who was Robert P. Fairbanks?

A. Robert P. Fairbanks was president and a director of United Artists Studio Corporation, Ltd., and a brother of Douglas Fairbanks.

Q. Are all your answers true as to the year 1930? A. Yes.

Q. Can you tell us who was assistant secretary and counsel for United Artists Studio Corporation, Ltd.? A. George W. Cohen. [87]

Q. Was he counsel for any of the other stockholders of United Artists Studio Corporation, Ltd.?

A. He was also counsel for Samuel Goldwyn, Inc., Ltd., and Feature Productions, Inc., Ltd.

Q. Mr. Ezzell, is it correct to say that in the activities in which United Artists Studio Corporation, Ltd., was engaged all the stockholders of United Artists and United Artists Studio Corporation, itself, act as an integrated enterprise?

(Testimony of Marvin A. Ezzell.)

Mr. Schmitt: If your Honor please, I object to that. That is a conclusion.

He can testify as to what positions they hold, but to say that they form just a general community and an integrated legal setup, I think is calling for a legal conclusion.

Mr. Diamond: I think that is a statement of fact, if your Honor please. If they act in a certain way, I think is a statement of fact on the part of the witness. There is no conclusion there.

Mr. Schmitt: At most it is an opinion, without any previous foundation.

The Court: I think probably it might be better for the witness to describe, if he can, the method in which they operated, and let the conclusion be drawn as to integration. [88]

By Mr. Diamond:

Q. Will you do that, Mr. Ezzell, please?

A. All of the stockholders of United Artists Studio Corporation, Ltd., were represented on the board of directors of United Artists Studio Corporation, Ltd., and took an active part in matters of the corporation, in which they were all vitally interested.

The Court: Are the stockholders the same in both—

The Witness: Well, the stockholders of United Artists Studio Corporation were represented by directors who were officers or employees of the stockholder corporations.

Due to the nature of the operation of the studio

(Testimony of Marvin A. Ezzell.)

it was essential that they have a close working knowledge of the operations of the studio so that they could dovetail their own production and fit it into the studio's schedule of operations. So they were well informed at all times of the operations and the financial condition of the studio corporation.

By Mr. Diamond:

Q. Bearing that out a bit further, Mr. Ezzell, what precisely did the stockholder-producers of United Artists Studio Corporation, Ltd., lease from the studio?

A. The stockholders leased office space, and when [89] engaged in the making of a picture leased from the studio stage space for the erection and photographing of sets, exterior lot space for the erection of and photographing of exterior sets, space for make-up, hairdressing, wardrobe, draperies, cutting rooms, dressing rooms and equipment of all kinds used in the making of motion pictures, and obtained from United Artists Studio Corporation, Ltd. so-called craft labor, meaning mechanical labor of all kinds, and materials used in the erection of sets and in the making of pictures. They obtained also from the studio the necessary services and facilities for recording sound.

Q. Were the stockholder-producers of United Artists Studio Corporation, Ltd., required to use the studio and personnel? A. Yes.

Q. How did the corporation bill its stockholders for the use of facilities?

A. The studio billed stockholders for the use

(Testimony of Marvin A. Ezzell.)

of labor and material on a daily basis. I should say they billed on a daily basis for the labor that was paid by the studio on a daily or hourly basis. They were billed daily for any equipment which customarily was rented on a daily basis. They were billed daily for the so-called production day charge, which was an over-all charge for [90] the right and privilege of photographing on the studio premises.

The Studio Corporation billed its stockholder-producers weekly and were paid weekly for office space and certain other items which were rented on a weekly basis.

Q. Mr. Ezzell, are all the answers you are giving as to the arrangements and relationships between United Artists Studio Corporation, Ltd., and its stockholders true as to the year, 1930?

A. Yes.

Q. Will you tell what arrangements were made for the payment of the amounts due from the stockholders to the corporation?

A. The stockholders paid their accounts weekly if the requirements of the studio were such as to necessitate the payment of funds.

If the studio did not need the funds for current operations, payments were not made as a rule weekly, but were paid more or less when the studio needed funds.

Mr. Schmitt: If your Honor please, I object to that question. This witness is attempting, without having laid any foundation, to say just how pay-

(Testimony of Marvin A. Ezzell.)

ments are required from people who owe money to this corporation. [91]

I think it is obvious that no one can tell just when they can meet an obligation. Yet this witness is telling that they pay when they get ready or when the studio wants the money.

The Court: Cross examination will probably develop that more fully. If he knows what is done between these interested parties it might shed some light.

Mr. Schmitt: I wish to register this objection at this time, if your Honor please, to his line of testimony.

The Court: All right.

By Mr. Diamond:

Q. Mr. Ezzell, are the answers that you have given true and correct of your own knowledge?

A. Yes, sir.

Q. Did the stockholder-producers of United Artists Studio Corporation, Ltd., have running accounts with the corporation? A. Yes, sir.

Q. Is that true for the year 1930?

A. Yes, sir.

Q. And did these running accounts reflect debit balances owing from the stockholders to the corporation?

A. They did, except that on occasions they may [92] have reflected credit balances.

Q. Could you tell us how these accounts were set up in 1930? Were they set up as a general, over-all indebtedness or were they set up picture by picture, or how?

(Testimony of Marvin A. Ezzell.)

Mr. Schmitt: If your Honor please, I think the accounts would be the best evidence, themselves, and not what this witness would testify in this regard.

The Court: What is the materiality of that?

Mr. Diamond: If your Honor please, I think that all of these questions go to the basic question that we have evolved as to the September 17, 1930, date.

Our position is that in the circumstances that existed in that year, in view of the relationship between the stockholders and the corporation, the fact that this was a closely held, integrated, well-knit corporation—when the corporation on September 17, charges its surplus with the amount of the dividend and credits the accounts of stockholders with their pro rata shares—that that, under the law in the decided cases, constitutes payment of that dividend.

From that standpoint, if your Honor please, it is highly essential for me to develop all the essential facts which bear on the relationship between the stockholders and the distributing corporation and which show the arrangements between the two.

The Court: I suppose, with reference to the manner of doing business between them, it might be permissible.

Mr. Diamond: Yes, sir.

The Court: I will overrule the objection.

Mr. Schmitt: Exception, please.

The Court: Note an exception.

(Testimony of Marvin A. Ezzell.)

By Mr. Diamond:

Q. Mr. Ezzell, in your capacity as manager of Samuel Goldwyn Studios do you have possession of and control over the books and records of United Artists Studio Corporation, Ltd.? A. Yes.

Q. Have you now in your possession the original records of United Artists Studio Corporation, Ltd., which reflect the running accounts for the year 1930, which you have just described?

A. I believe they are here in court.

Q. Did you furnish those records to us at our request? A. Yes.

Q. Did you, at our request, make a summary from the original records of United Artists Studio Corporation, Ltd., of these running accounts?

A. Yes. [94]

Q. Can you tell us whether they were set up picture by picture?

A. They were set up picture by picture in 1930.

Q. In 1930? A. Yes.

Q. Were they set up picture by picture in the year 1933? A. No.

Q. Will you look at that summary that you have drawn at our request and advise us as to what the total indebtedness of the stockholders to the United Artists Studio Corporation, Ltd., was on September 17, 1930?

A. The aggregate amount?

Q. Yes, sir.

A. \$85,865.06 (referring to document).

Mr. Schmitt: What is the witness testifying from there?

(Testimony of Marvin A. Ezzell.)

Mr. Diamond: The witness is testifying from a summary which he made from the original books and records of United Artists Studio Corporation, Ltd., which are here in court at this time.

Mr. Schmitt: For what period?

Mr. Diamond: For the year 1930.

Mr. Schmitt: Has he made any summary of any other periods? [95]

Mr. Diamond: I am not so sure I ought to be called on to answer that question, Mr. Schmitt. I think you might address that to the witness.

Mr. Schmitt: I just wanted to know if he is reading from a compilation of just part of the years involved.

Mr. Diamond: There are only two dates about which I am asking the witness, Mr. Schmitt, one is September 17, 1930, on which the witness has just testified, and the other is December 15, 1930.

By Mr. Diamond:

Q. Will you tell us what the total indebtedness from the stockholders to the corporation was on December 15, 1930? A. \$90,818.87.

Mr. Diamond: Will you read back what the witness answered for the balance—

By Mr. Diamond:

Q. Mr. Ezzell, have you made a breakdown of those balances for each stockholder?

A. Yes.

Q. Will you look at the accounts on September 17, 1930, and tell us what the individual balances were in the individual accounts?

(Testimony of Marvin A. Ezzell.)

A. On September 17, 1930, the balance for Feature Productions was \$4133.41;

For the Douglas Fairbanks Company— [96]

Q. Before you go into that, Mr. Ezzell, on that individual account that you have just read, do you have a further breakdown of that, picture by picture? A. I do.

Q. Would you read that to us?

A. Yes. Balance on September 17, 1930, for Feature Productions, not involving any particular picture, was \$2,552.23; for the picture known as Abraham Lincoln, \$462.99.

Mr. Schmitt: If your Honor please, I believe this is encumbering the record unnecessarily.

The Court: What is the reason for breaking down these pictures?

Mr. Diamond: I wanted to show that the indebtedness was broken down into individual accounts.

The Court: I do not think it is material here.

Mr. Diamond: All right, I won't ask any further questions along that line.

By Mr. Diamond:

Q. Would you just read us there, Mr. Ezzell, what the debit balances per individual accounts were on September 17, 1930?

A. Feature Productions, \$4133.41;

Douglas Fairbanks, a credit balance of \$5143.19;

Mary Pickford, \$21,913.27. [97]

Mr. Tannenbaum: Credit or debit?

The Witness: Debit.

(Testimony of Marvin A. Ezzell.)

A. (Continuing): Samuel Goldwyn, Inc., Ltd., debit balance of \$64,961.57.

As of December 15, 1930:

Feature Products, a debit balance of \$83,086.05;

Douglas Fairbanks Co., a debit balance of \$2,459.27;

Mary Pickford Co., \$1,324.69.

By Mr. Diamond:

Q. Is that a debit balance?

A. Debit balance. Samuel Goldwyn, Inc., Ltd., a debit balance of \$3,948.86.

Q. Mr. Ezzell, these totals that you have read us represent aggregates of breakdowns by individual pictures, is that correct?

A. Individual pictures or miscellaneous charges where individual pictures were not involved.

Q. Mr. Ezzell, I think you testified that the stockholders were familiar with the day-to-day operations of United Artists Studio Corporation.

Could you tell us whether they got financial reports on the operations of that corporation?

A. Mr. Diamond, periodic financial reports were supplied to the stockholders. [98]

Q. How frequently were those reports supplied?

A. Usually monthly; sometimes more frequently, particularly if requested by a stockholder.

Q. Did the stockholders on September 11, 1930, know that a resolution was passed by the board of directors declaring a dividend?

Mr. Schmitt: I object, if your Honor please.

The Court: I do not know whether he knows whether or not information was furnished.

(Testimony of Marvin A. Ezzell.)

By Mr. Diamond:

Q. Mr. Ezzell, on September 17, 1930, was Feature Productions advised that it had been credited on the books of United Artists with its proportionate share of the dividend declared on September 11, 1930?

A. They had full knowledge of that due to the fact that A. M. Brentinger who was general manager of Feature Productions, was also general manager of United Artists Studio Corporation, a member of the board of directors of United Artists Studio Corporation, Ltd., had direct control over the accounting activities of the Studio Corporation, and being a member of it, he participated in the declaration of the dividend.

Mr. Schmitt: If your Honor please, I ask that his answer be stricken there. He is testifying for this Mr. Brentinger, and he has shown no qualifications to know [99] just what Mr. Brentinger would do.

The Court: I think Mr. Brentinger would be better qualified to answer.

Mr. Diamond: I agree with your Honor, but Mr. Brentinger, I think has been dead for a number of years.

The Court: I think the witness is assuming too much prerogative to speak for the knowledge of Mr. Brentinger.

By Mr. Diamond:

Q. Mr. Ezzell, did you, as auditor, know in 1930 of the declaration of the dividend? A. Yes.

(Testimony of Marvin A. Ezzell.)

Q. When did you know about it?

A. About the time it was declared.

Q. Did you know that on September 17, 1930, United Artists Studio Corporation, Ltd., credited on its books Feature Productions with a pro rata share of Feature Productions in the dividend that was declared?

A. You say on September 17, 1930?

Q. No. Did they know that on September 17? Did Feature Productions know of the crediting that was done on September 17, 1930?

A. Well, I would have to say that Feature Productions knew, because Brentinger was Feature Productions' general manager. [100]

Mr. Schmitt: If your Honor please, I again object to that type of response.

By Mr. Diamond:

Q. Did you know, Mr. Ezzell?

A. I cannot say for a certainty that I knew as of that particular date.

Q. When did you know?

A. No later than as of the time we received the next report from the Studio Corporation.

Q. When would that be?

A. No later than the time that the report for the month of September would have been made available.

Q. Mr. Ezzell, have you in your possession the ledger sheet of United Artists Studio Corporation showing the capital stock of United Artists issued and outstanding on July 1, 1930?

(Testimony of Marvin A. Ezzell.)

A. I believe it is here.

The Court: We will take a recess for ten minutes.

(Recess taken.)

By Mr. Diamond:

Q. Mr. Ezell, I show you a book and ask you what that book is?

A. General ledger of United Artists Studio Corporation, Ltd. [101]

Q. Is that the original ledger book?

A. Yes.

Q. Will you turn to the ledger sheet of United Artists Studio Corporation, Ltd., and advise us—turn to the capital stock account of United Artists Studio Corporation, Ltd., as of July 1, 1930?

A. I have.

Q. Do you have it, Mr. Ezzell?

A. I have it.

Q. Will you advise us as to the amount of capital stock of United Artists Studio Corporation, Ltd., issued and outstanding on July 1, 1930, as shown by the general ledger? A. \$867,200.

Q. Will you now turn to the ledger sheet of United Artists Studio Corporation, Ltd., showing the surplus of that company as at July 1, 1930?

A. I have it.

Q. Will you advise us as to what that sheet shows the surplus of the company to be as of July 1, 1930? A. \$262,586.10.

Q. Will you turn to the ledger sheet of the United Artists Studio Corporation, Ltd., showing the capital account of that company as of July 1, 1931? A. I have it. [102]

(Testimony of Marvin A. Ezzell.)

Q. Will you advise us as to what the balance of the capital stock account was on that date?

A. \$967,100.

Q. Is that the total amount of the capital stock of United Artists Studio Corporation, Ltd., on that date, as shown by that ledger sheet?

A. That is correct.

Mr. Schmitt: What were those figures, please, again, on July 1, 1930—

The Witness: On July 1, 1930, \$857,200; on July 1, 1931, \$967,100.

By Mr. Diamond:

Q. Will you be good enough to turn to the ledger sheet showing the surplus account of United Artists Studio Corporation, Ltd., as of July 1, 1931? A. I have it.

Q. What does the ledger sheet show that surplus to be on that date? A. \$58,971.12.

Q. Mr. Ezzell, have you prepared from the original records of the corporation a balance sheet of the corporation as of September 17, 1930, and one as of December 15, 1930? A. No.

Mr. Diamond: Strike that—I withdraw the question. [103]

Mr. Schmitt: Will your Honor rule on that withdrawal?

The question was asked and the answer made, and I would like it to stay in the record.

The Court: Do you have any objection to the withdrawal?

Mr. Schmitt: Yes. The answer was “No.” It was negative.

(Testimony of Marvin A. Ezzell.)

The Court: All right, let it stand.

By Mr. Diamond:

Q. Mr. Ezzell, would it have been possible for you to construct a balance sheet from the records you have as of that date? A. No.

Q. Could you turn to the general ledger from which you have just read and advise us what the net assets of United Artists Studio Corporation, Ltd., were on July 1, 1930, and again on July 1, 1931?

A. Net assets on July 1, 1930, were \$262,586.10, and on July 1, 1931, \$58,971.12.

Q. I am asking you for the net assets of United Artists Studio Corporation, Ltd?

A. I cannot answer that from this book; I am sorry.

Q. Could you advise us as to the net worth of United Artists Studio Corporation, Ltd., on those two [104] dates?

A. The net worth of the Studio Corporation on those two dates would be the sum of the figure given as capital stock issued and the surplus, the combination of the two figures that have been given.

Q. Could you tell us how much that was? Could you make the computation for us?

A. I think so. On July 1, 1930, \$1,129,786.10; on July 1, 1931, \$1,026,071.12.

Q. Mr. Ezzell, in the actual operation of United Artists Studio Corporation, Ltd., back in the period

(Testimony of Marvin A. Ezzell.)

around 1930 did the corporation have occasion to borrow money?

A. Prior to 1930 and subsequent to 1930, yes.

Q. From what sources was it able to borrow?

A. It was able to borrow from its controlling stockholder, Feature Productions, Inc., Ltd., and from commercial banks.

Q. Were these borrowings in substantial amounts? A. Yes.

Q. Mr. Ezzell, on Joint Exhibit C, which is attached to the stipulation of facts in this case, I notice that Samuel Goldwyn, Inc., Ltd., is credited with two amounts: one, the amount of \$20,979, and the other an amount of \$1,565.67.

Will you tell us what the amount of \$20,979 represents? [105]

A. It represents a dividend of \$21 a share on 999 shares of capital stock of United Artists Studio Corporation, Ltd.

Q. What was the amount of \$1565.67?

A. That represents an erroneous entry placed on the books, based on a misconception of an agreement which was in existence at that time between Samuel Goldwyn, Inc., Ltd., and United Artists Studio Corporation Ltd., and the entry was corrected subsequently.

Q. Was the entry reversed subsequently?

A. It was reversed subsequently.

Mr. Diamond: If your Honor please, on behalf of respondent and petitioner I want to offer at

(Testimony of Marvin A. Ezzell.)

this time as Joint Exhibit, journal entries of United Artists Studio Corporation, Ltd., under date of May 27, 1933, being journal entry No. 896.

The Court: It will be received in evidence and marked Exhibit 4-D.

(The document referred to was admitted in evidence and marked Exhibit 4-D.)

[Exhibit 4-D is set out in full at page 153 of this printed record.]

Mr. Diamond: I offer in evidence journal entry of United Artists Studio Corporation, Ltd., No. 897.

The Court: It will be admitted in evidence and marked Exhibit 5-E. [106]

(The document referred to was admitted in evidence and marked Exhibit 5-E.)

[Exhibit 5-E is set out in full at page 154 of this printed record.]

Mr. Diamond: I offer as a further joint exhibit a photostatic copy of general ledger sheet, headed, "Dividends Payable," being account No. 105 on the books and records of United Artists Studio Corporation, Ltd.

The Court: Exhibit 6-F.

(The document was marked Exhibit 6-F and admitted in evidence.)

[Exhibit 6-F is set out in full at page 156 of this printed record.]

Mr. Schmitt: Will you call attention to those things marked on there?

Mr. Diamond: If your Honor please, I want to

(Testimony of Marvin A. Ezzell.)

note for the record that Exhibit 5-E, being journal entry No. 897, contains two yellow slips being dated May 27, 1943.

By Mr. Diamond:

Q. Mr. Ezzell, I show you the account sheets of United Artists Studio Corporation, Ltd., of 1933, which have previously been offered as a joint exhibit of petitioner and respondent, and ask you what they represent?

A. The first document is journal entry No. 896, dated May 27, 1933. It represents a charge to dividends payable account of Mary Pickford-Fairbanks and of Douglas Fairbanks, and a credit to the dividends payable account of Feature Productions, Inc., Ltd., in the amount of [107] \$28,000.

Q. You mean Feature Productions, Inc., Ltd., or United Artists Studio Corporation, Ltd.?

A. Credit to the account of Feature Productions, Inc., Ltd.

Q. Are all of these entires that I have referred to credits made in 1933 to the accounts of individual stockholders? A. Yes.

Q. Will you tell us why those credits were not made in 1930? A. Well---

Q. Tell us why they were made in 1933?

A. They were made in 1933 because at that time the United Artists Studio Corporation, Ltd., received instructions from the shareholders as to the disposition of the dividends which had been credited to their accounts.

(Testimony of Marvin A. Ezzell.)

Q. Had any instructions been received from stockholders prior to 1933? A. No.

Q. Will you tell us why these entries could not have been made in 1930, either on September 17, or December 15, if you know?

A. In my opinion—

Mr. Schmitt: That is exactly what I made that [108] interrogation for, if your Honor please.

The Court: State what you know, but not what you think.

A. (Continuing): In 1930 the accounts receivable of the various stockholders were broken down by individual picture accounts, whereas at a subsequent date the accounts receivable were consolidated into one account for each stockholder, and it would not have been feasible to attempt to credit the dividend against the numerous accounts which were by picture in 1930.

By Mr. Diamond:

Q. Mr. Ezzell, in 1933, you stated you were auditor of United Artists Studio Corporation, Ltd.? A. That is correct.

Q. Were these 1933 entries made by you?

A. Yes.

Q. All of them?

A. Yes. May I see them again, to make sure I made all of them?

(Mr. Diamond hands book to the witness.)

A. (Continuing): The journal entries were made by me; both of them. The two credit memor-

(Testimony of Marvin A. Ezzell.)

anda were prepared under my instructions and approved by me or initialed by me, and the entries on the dividend payable ledger sheets were prepared by people charged with the responsibility [109] of making the proper entries on the books under my supervision.

Mr. Schmitt: What year were those ledger entries?

The Witness: 1933 I am speaking of.

Mr. Schmitt: And not in 1930 or 1931?

The Witness: No.

Mr. Diamond: That is not the question.

I want to note for the record that the witness is testifying as to Joint Exhibit 4-D, Joint Exhibit 5-E and Joint Exhibit 6-F.

The Court: That is the testimony just given in answer to the question you asked?

Mr. Diamond: Yes, sir.

By Mr. Diamond:

Q. Will you state, Mr. Ezzell, under what authority you made these entries or directed that they be made?

A. The entries were made on the instructions of A. M. Brentinger, general manager of United Artists Studio Corporation, Ltd. His instructions were predicated on written instructions received from the shareholders.

Q. Were those instructions in writing, Mr. Ezzell?

A. They were.

Q. I show you letter of Feature Productions,

(Testimony of Marvin A. Ezzell.)

Inc., to United Artists Studio Corporation, Ltd., under date of [110] June 27, 1933, and another letter from and to the same persons under date of June 27, 1933, and ask you what these letters represent.

A. One of these letters represents instructions to United Artists Studio Corporation, Ltd., to retain the amount of dividend of \$136,327.17 and apply it on account of the indebtedness owing by Feature Productions, Inc.—apply it on account of the indebtedness owing by Feature Productions, Inc., Ltd., to United Artists Studio Corporation, Ltd.

The Court: Who was it signed by?

The Witness: A. M. Brentinger—instead of paying the amount to Feature Productions, Inc., Ltd., in money.

The other letter—

The Court: They both bear the same date?

The Witness: They both bear the same date.

The other letter represents instructions from Feature Productions, Inc., Ltd., to United Artists Studio Corporation, Ltd., to apply to the indebtedness of Feature Productions, Inc., Ltd., to United Artists Studio Corporation, Ltd., \$28,000, the dividend declared on September 11, 1930, these instructions being—

Mr. Schmitt: If your Honor please, I do not want the witness to read that letter and get in by indirection [111] what might be objected to if the letter is subsequently offered.

(Testimony of Marvin A. Ezzell.)

The Court: I think it would be proper to first identify the letter and authorize its introduction, instead of letting him quote from it.

Mr. Diamond: All right.

Mr. Clerk, I offer for identification letter of Feature Productions, Inc., Ltd., to United Artists Studio Corporation, Ltd., dated June 27, 1933.

The Court: Has the witness identified the letter? Does he know who wrote it?

Mr. Diamond: I will get that, your Honor. I am just identifying it now.

(The document referred to was marked Petitioner's Exhibit 1 for identification.)

Mr. Diamond: I offer for identification another letter from Feature Productions, Inc., Ltd., to United Artists Studio Corporation, Ltd., dated June 27, 1933.

(The document referred to was marked Petitioner's Exhibit 2 for identification.)

Mr. Diamond: I offer for identification a letter from Samuel Goldwyn, Inc., Ltd., by Abraham Lehr, vice-president, to United Artists Studio Corporation, Ltd., dated June 27, 1933. [112]

(The document referred to was marked Petitioner's Exhibit 3 for identification.)

Mr. Diamond: I offer letter of Abraham Lehr to United Artists Studio Corporation, Ltd., dated June 27, 1933, for identification.

(The document referred to was marked Petitioner's Exhibit 4 for identification.)

(Testimony of Marvin A. Ezzell.)

By Mr. Diamond:

Q. Mr. Ezzell, I show you Petitioner's Exhibit 1, 2, 3 and 4, and ask you whether it was pursuant to such exhibits that the 1933 entries were made.

A. It was.

Q. I ask you whether you are familiar with the signature of A. M. Brentinger? A. I am.

Q. Is that his signature (indicating)?

A. It is.

Mr. Diamond: I am now referring to Petitioner's Exhibit 1 for identification.

By Mr. Diamond:

Q. I show you Petitioner's Exhibit 2 and ask you whose signature appears thereon.

A. That of A. M. Brentinger.

Q. Are you familiar with the signature of Abraham [113] Lehr? A. I am.

Q. Will you look at Petitioner's Exhibit 3 for identification and advise us whose signature appears thereon? A. That is Abraham Lehr.

Q. I ask you to look at Petitioner's Exhibit 4 for identification and state whose signature appears thereon. A. That of Abraham Lehr.

Mr. Diamond: If your Honor please, I offer in evidence Petitioner's Exhibits previously marked 1, 2, 3 and 4 for identification.

The Court: Any objection?

Mr. Schmitt: I object to them, if your Honor please, because I think it is immaterial what action the stockholders have taken in this matter. I think the book entries show what action the cor-

(Testimony of Marvin A. Ezzell.)

poration took. I think it is immaterial what the distributees or those who received this dividend in 1933—what motivated them.

I further object to it on the ground that it is the letter, in one instance there, of a man who is deceased, and it contains certain matters that are not relevant to the entry which was made in 1933. It refers back in a self-serving manner to something that transpired in 1930, and to let the whole letter go in, showing the [114] attitude of the recipient, I do not think is material to what action really took place on behalf of the Studio Corporation.

The Court: That would go, I think, rather to the effect of the testimony than to its admissibility.

I will overrule your objection.

Mr. Schmitt: Exception.

(The documents referred to were admitted in evidence and marked Petitioner's Exhibits 1, 2, 3 and 4.)

[Petitioner's Exhibits 1, 2, 3 and 4 set out in full, pages 158 through 161 of this printed record.]

Mr. Diamond: I am through with the witness.

The Court: Does counsel for respondent want to cross examine?

Mr. Schmitt: Yes, if your Honor please.

Cross Examination

By Mr. Schmitt:

Q. You said that you were auditor for the Feature Productions in 1930? A. Yes, sir.

(Testimony of Marvin A. Ezzell.)

Q. How long did you continue in that capacity?

A. Until the day preceding the day I joined the United Artists Studio Corporation, Ltd., as auditor in January, 1932.

Q. You no longer had any connection as auditor of Feature Productions after you went over with Studios; is [115] that correct?

A. That is correct.

Q. How long did you remain as auditor of Studios?

A. Until I became business manager of Studios on August 5, 1935.

Q. 1935? A. Yes.

Q. During the period prior to 1932 where did you have your office?

A. In the building occupied as an office building by Feature Productions on the premises of United Artists Studio Corporation, Ltd.

Q. Did anyone succeed you as auditor there?

A. Yes. I am trying to think who did.

Q. Then he became the custodian of the books and records? A. Yes.

Mr. Diamond: Of what corporation are you talking?

Mr. Schmitt: Of Feature Productions. I mentioned, of course, prior to 1932.

By Mr. Schmitt:

Q. Where are those books now; the Feature Production Company's books?

A. I do not know. I understand that they have [116] been destroyed. I do not know.

(Testimony of Marvin A. Ezzell.)

Q. After you took over new responsibilities in 1935 who succeeded you as auditor?

A. W. H. Tuck.

Q. He became the custodian of those books and records of Studios?

A. That is right, the direct custodian of them.

Q. I beg your pardon.

A. The direct custodian of them.

Q. Where did you get these journals and ledgers that were brought into court?

A. I got them from Axel Nissen, who is now the auditor for Samuel Goldwyn Studios.

Q. Where were they physically?

A. Located in a vault on the premises of United Artists Studio Corporation, Ltd., or Samuel Goldwyn, as it is now known.

Q. Did you prepare any returns for Feature Productions? A. Yes.

Q. Did you prepare any from the year—

The Court: You mean income tax returns?

By Mr. Schmitt:

Q. Income Tax returns? A. Yes. [117]

Q. For what years?

A. I would have to see them to be certain.

Q. During the time that you were the auditor—

A. Yes.

Q. (Continuing): —did you prepare any returns for Douglas Fairbanks, Mary Pickford—

A. I did not.

Q. —or for Joseph M. Schenck?

(Testimony of Marvin A. Ezzell.)

A. I did not.

Q. Pickford-Fairbanks Studio?

A. I did not.

Q. Pickford-Fairbanks Studios; is that a corporation? A. That was a corporation.

Q. That was a corporation? In 1930?

A. I believe it had been dissolved prior to 1930.

Q. Samuel Goldwyn, Inc., is a corporation, Samuel Goldwyn, Inc., Ltd.?

A. It was a corporation.

Q. It was a corporation? A. Yes.

Q. Did you prepare income tax returns for Studios in 1932? A. Yes.

Q. How about 1930 and 1931? [118]

A. No.

Q. 1933?

A. I believe so. I would have to see the returns.

Q. I will ask you to look at these returns of United Studio Corporation, which later on was called United Artists Studio Corporation, Ltd., for 1930, '31, '32 and '33, and tell me who signed those.

A. For the fiscal year of '30-31 it was signed by R. P. Fairbanks, president; and A. M. Brentinger, vice-president.

Q. Is this the signature (indicating)?

A. Yes.

Q. Which should correspond with the signature on that letter, shouldn't it? A. It should.

Q. Do you know who the auditor of Studio Corporation was in 1931? A. Yes.

(Testimony of Marvin A. Ezzell.)

Q. Do you notice his name on the return?

A. Yes; that of L. B. Smith.

Q. And he was the custodian of the books of Studio? A. According to the return he was.

Q. That is the same for the year 1932—who was the auditor and the custodian of the books?

A. M. A. Ezzell. [119]

Q. And for the year 1930?

A. Irwin Luttermoser.

Q. In the year 1933—do you know who the auditor was for that year?

A. May I see the return?

(Mr. Schmitt hands paper to witness.)

A. I do not know. I know that I was auditor, but I cannot say who the return would indicate as having returned it.

Q. You were not auditor prior to these other returns?

A. I was auditor commencing with early January, 1932.

Q. But you were not the auditor who prepared the returns to which other names have been signed and which names have been called off?

A. That is correct.

Q. (Continuing): Mr. Smith and—

A. Mr. Luttermoser.

Q. —and some other third gentleman?

A. I think those were the only two that were read.

Q. Yes, I think that is right. As a matter of

(Testimony of Marvin A. Ezzell.)

fact, you do not know anything, of your own knowledge, about Studios Corporation's books and affairs in 1930? [120] A. Yes, I do.

Q. What is the basis of your knowledge?

A. The basis of my knowledge is the reports that were supplied to me as auditor for Feature Productions, by United Artists Studio Corporation, Ltd.

Q. You were not the active bookkeeper or auditor during that period?

A. Of what company?

Q. Of the Studios Corporation? A. No.

Q. Do you know who made the entry in the general ledger September 17, 1930, which is account No. 105, which has been introduced—

Mr. Diamond: Would you show that to the witness?

A. Not without seeing it, I wouldn't know.

Mr. Schmitt: I am sure that he would not, in view of his previous answer.

The Witness: This particular penmanship you are asking about?

Mr. Schmitt: Yes.

The Witness: I cannot identify it.

Mr. Diamond: What are you showing the witness? There are several handwritings on that.

Mr. Schmitt: September 17, 1930, entry.

Mr. Diamond: And only those entries; is that [121] right?

Mr. Schmitt: That is right.

(Testimony of Marvin A. Ezzell.)

By Mr. Schmitt:

Q. So anything that you might have said in respect of why something was done or something was not done by Studios Corporation in 1930 is just a surmise?

Mr. Diamond: I object to that, your Honor. That is trying to characterize what the witness said.

The Court: That is cross examination. I think he has a right to ask that.

A. I do not think you can say that anything I might have said—because that is a question of my remembering everything that may have happened, and our organizations were rather close to each other and we knew pretty well what was going on.

By Mr. Schmitt:

Q. They were separate individuals and separate corporations, were they not? A. Yes.

Q. And you know that they filed income tax returns? A. I have seen them.

Q. You do not know what various businesses Mary Pickford was engaged in, commercial enterprises, do you?

A. Not all of them; quite a few of them, yes.

Q. This was only a small part, wasn't it—this [122] \$20,000?

A. I would not measure the proportion of it. But it was a part.

Q. And Douglas Fairbanks, the same? He was

(Testimony of Marvin A. Ezzell.)

a man of large investments and holdings and enterprises during that period?

A. So I understand.

Q. And Mr. Schenck and the other stockholders in like manner?

A. Well, Mr. Schenck; and if you will name the other stockholders I will give an answer on them.

Q. What I would like for you to do is to point to something in the books or something in the records, other than a surmise, as to why Studios made or did not make these entries in 1930 in respect of these recipients?

A. Which particular entries do you mean?

Q. The entries I am speaking of are the credits that were made in 1933 to these people, and you have attempted to give some reasons why they were not made in 1930. A. Well—

Q. I want you to point to some book or record to substantiate that.

A. I believe we have in court some accounts receivable ledger sheets which show that in 1930 the accounts with the stockholders were segregated by charges [123] against various pictures and that at a later time those charges were not so segregated.

Q. You spoke of accounts receivable from these various stockholders? A. Yes, sir.

Q. And you cited some figures of \$90,000 and \$85,000 odd? A. Yes, sir.

(Testimony of Marvin A. Ezzell.)

Q. Those figures represented the year 1930, did they not?

A. They represented a particular time or times of 1930.

Q. Will you turn to the books and find out what the status of those receivables were in 1931, '32 and '33, and I would like also to see the one for 1930? A. What particular times?

Q. I want the same dates that you used before: September 15 and December 15, 1931.

Mr. Diamond: You mean September 17, Mr. Schmitt?

Mr. Schmitt: I thought when you were giving the \$85,865.06 that was September 15. But either date will do.

Mr. Diamond: In other words, you were asking the witness—

Mr. Schmitt: To carry on for the years '31, '2 [124] and '3 the same as he did for the year '30.

Mr. Diamond: I am not sure I understand what you want from the witness.

These amounts vary at different times during the year. Do you want the highest amount?

Mr. Schmitt: He picked out the date when the dividend was declared and the date when the dividend was payable, both in 1930.

Mr. Diamond: That is not correct. He picked out the date in 1930 when the individual stockholders were credited with their prorata share of the distribution. That date is September 17, 1930.

(Testimony of Marvin A. Ezzell.)

Mr. Schmitt: The stockholders' accounts were credited on that date?

Mr. Diamond: Yes.

Mr. Schmitt: Where is that entry??

Mr. Diamond: That will appear on Exhibit 3-C.

Mr. Schmitt: That is right.

Mr. Diamond: If your Honor please, I notice here the photostatic copy is not particularly clear. I would like the record to show by agreement of counsel, if Mr. Schmitt is agreeable, that the date of journal entry which is Exhibit 3-C of the stipulation, is September 17, 1930, pursuant to the allegations of paragraph 9 of the stipulation. [125]

Mr. Schmitt: Repeat that, will you please?

Mr. Diamond: Will you read that back?

(Record read by reporter.)

Mr. Schmitt: That is agreeable.

That is Exhibit 3-C of the exhibit?

Mr. Diamond: If I may complete my statement now, if your Honor please—I asked the witness the status of the accounts receivable from the individual stockholders on those two dates, September 17, 1930, and December 15, 1930.

My difficulty with Mr. Schmitt's line of inquiry is that it asks the witness in effect to read the balance on 365 days of the year in 1931, '32 and part of 1933, and I do not think the witness should be called on to read daily balances.

Mr. Schmitt: If your Honor please, I will reframe the question.

(Testimony of Marvin A. Ezzell.)

By Mr. Schmitt:

Q. The dates I select are the 1st of January and December 31, 1931, '32 and '33.

Mr. Diamond: If your Honor please, I will object to those on the ground that the question seeks to elicit immaterial responses. The status of those accounts during the intervening years is not in issue in the case. [126]

The Court: I think legitimate cross examination might permit some latitude.

Mr. Diamond: All right, sir.

A. The records that we have here do not show what the balances were on the 1st of January of 1931.

By Mr. Schmitt:

Q. What do the books show? The books are complete, aren't they?

A. Not to that extent.

Q. What are they? I want to find out if we have just a partial—

A. May I explain?

Q. Yes, go ahead.

A. Commencing with some time in 1931 the then auditor of the Studio Company conceived an idea of handling accounts receivable in a very unorthodox manner.

Mr. Schmitt: Your Honor, I object to that.

Mr. Diamond: You asked the witness to explain, Mr. Schmitt. I suggest you permit him to finish.

Mr. Schmitt: I do not want him to explain in that sort of fashion, criticizing and stultifying his

(Testimony of Marvin A. Ezzell.)

own books and records. I think that is illegitimate, coming in and saying, "We want you to accept books at face value," and then saying, "They are unorthodox and undependable." [127]

The Witness: I do not say they are undependable. I said we have them. I was going to explain that they are not the kind of records you can work from in a limited time or space, because you have to spread the sheets out because the balances were not carried in the way I have them carried here.

By Mr. Schmitt:

Q. What books do you have in court in response to all the inquiries, and so forth? Do you have a complete journal?

A. I think we have complete journals affecting the accounts that we understood would be affected. I do not think we have every journal entry that affected every account in the books, sir.

Q. But you have every journal entry affecting these particular accounts?

A. I think so, sir. We have the accounts receivable commencing with —

The Court: This is the original book of entries that you used?

The Witness: Yes, sir.

The dates you wanted were January 1 and December '31, and the first year was what?

By Mr. Schmitt:

Q. '31. [128]

A. '31?

(Testimony of Marvin A. Ezzell.)

Q. Yes.

A. I find that we do have January 31 figure.

Q. January 1, '31?

A. No. And the reason for that is that the entries were made on week-ending dates. They are not necessarily the 1st day or the last day of the month.

Q. Well, approximately is all I am trying to get; the beginning and end of the year, approximately.

A. I would have to have paper and pencil to do some computing here.

Mr. Schmitt: I do not know whether it will save any time for your Honor for him to make those computations.

The Court: Will it take you a while to do that?

The Witness: Quite a while.

The Court: About how long?

The Witness: Well, at least a half hour. At least that; probably longer. I have no objection whatever to doing it.

Mr. Diamond: Would it be agreeable to Mr. Schmitt if we have the highest balances of the years you want?

Mr. Schmitt: These books do not seem to me to [129] be in too good a shape, and I would like to have just what I asked for.

The Court: I think you have a right to go into that, testing the validity and accuracy of the books.

How much more testimony do we have, after this witness?

(Testimony of Marvin A. Ezzell.)

Mr. Diamond: I am through with this witness, your Honor, and I do not believe I have any additional testimony.

Mr. Schmitt: I do not believe I have any further testimony.

The Court: We will take a recess for 20 minutes, and see how far we can get.

(Recess taken.)

The Court: As I understand the agreement of counsel, the witness will make his computations and they will be submitted to respondent's counsel by Wednesday morning, together with the books from whence computation was made, and then on Thursday we will take the matter up again.

Mr. Diamond: Your Honor, the witness has just told me that he will be unable, from what he has there, to make a computation of December, 1931.

The Witness: I can get after January 1 of that particular year. [130]

By Mr. Schmitt:

Q. You cannot get the end of the year?

A. Not that particular year; not 1931.

Q. How about 1932?

A. Yes, I can get that.

Q. All right, get me the beginning of '31, both of '32 and both of '33. A. Yes, sir.

The Court: Is that understood now?

Mr. Diamond: Yes, sir.

The Court: All right, then that will be furnished to counsel for respondent Wednesday morn-

(Testimony of Marvin A. Ezzell.)

ing, together with the books from which it was made, and then on Thursday we will see if some agreement can be had with reference to it.

Is there any other question you would like to ask this witness?

Mr. Schmitt: I would like to. Will your Honor run on for half an hour?

The Court: I thought we would get through with the witness if we could.

By Mr. Schmitt:

Q. Would you mind describing the physical location of this studio again? Is it all one unit?

A. Yes, sir, occupying the location at the intersection [131] of Santa Monica Boulevard and Formosa Avenue in Los Angeles, California.

Q. You were not auditor for anyone other than Feature Productions in 1930, were you?

A. In 1930 we kept several sets of books for Mr. Joseph M. Schenck's various enterprises. I was auditor for him, handled those books in connection with my position as auditor for Feature Productions.

Q. You were not auditor for Douglas Fairbanks? A. No, sir.

Q. Or Mary Pickford? A. No, sir.

Q. Or any of the other stockholders or recipients, except Feature Productions?

A. Well, specifically at that time I was not auditor for Samuel Goldwyn, Inc., Ltd., I was not auditor for Mary Pickford or for Douglas Fairbanks or for Pickford-Fairbanks Studios Co.

(Testimony of Marvin A. Ezzell.)

Q. And you were not auditor for Studios Company?

A. No, I was not auditor for Studios Company in 1930.

Q. So of your own knowledge you do not know how Studios treated the accounts of these stockholders whom you did not—

Mr. Schmitt: Counsel is nodding his head in [132] agreement. He is distracting me.

Mr. Diamond: Not I.

Mr. Tannenbaum: He does.

Mr. Schmitt: I know, but I am asking the witness.

Mr. Tannenbaum: I am sorry.

Mr. Schmitt: No offense.

A. Would you mind restating your question, sir?

By Mr. Schmitt:

Q. So you do not know, of your own knowledge, just how Studios treated the running accounts of these stockholders? A. At what time?

Q. In 1930, you not being the auditor?

A. Well, I know by having reports prepared.

Q. What reports?

A. Periodic reports that were made—

Q. Where are they?

A. Where are they?

Q. Yes.

A. I do not even know that copies are in existence today.

(Testimony of Marvin A. Ezzell.)

Q. What kind of reports?

A. Weekly—monthly reports, and at times—

Q. But you might have received those reports from Feature Productions, but you do not know that Mary Pickford [133] received them.

A. No. I only know this, sir, that Studio Corporation did prepare such reports and copies of such reports came to me as auditor of Feature Productions, Inc., Ltd.

Q. You do not know whether the others—

A. Not of direct knowledge.

The Court: For what purpose were those reports prepared?

The Witness: They were prepared primarily to give the stockholders a running knowledge of the conditions and operations of the company.

The Court: Was it the business of the corporation to furnish the stockholders these reports?

The Witness: I do not know whether it was the business or not.

The Court: Do you know whether or not it was done?

The Witness: It was done, so far as Feature Productions was concerned, that I know of direct knowledge.

By Mr. Schmitt:

Q. But you do not know what Studios did or what its practice was in 1930 and '31, do you?

Mr. Diamond: Yes, he does, Mr. Schmitt. He [134] has the Studio books there.

(Testimony of Marvin A. Ezzell.)

Mr. Schmitt: All right, let him show the reports.

By Mr. Schmitt:

Q. Point to the books, then. Counsel says you have it. Point to the books which will show the practice of Studios in sending out reports in 1930, '31 and '32. I would like to have those documents.

Mr. Diamond: No, he stated that on his own knowledge.

Mr. Schmitt: The books will not show the practice of that corporation during those years?

By Mr. Schmitt:

Q. Will it?

Mr. Diamond: I do not think books ever do.

Mr. Schmitt: He said, "No," and you interrupted to say that he did know when I asked him did he know.

Mr. Diamond: You asked him whether he knew of his own knowledge how those dividends were treated on the books of the corporation.

Mr. Schmitt: I did not say anything about dividends.

Mr. Diamond: I thought you had. If you have not I withdraw my statement. [135]

By Mr. Schmitt:

Q. Where is the minutes book of Studios?

A. In the courtroom.

Q. You are familiar with this minutes book (indicating)?

A. Generally, so, yes, sir.

(Testimony of Marvin A. Ezzell.)

Q. Is there anything in this minutes book, any resolution or anything which gives any reason why the dividend declared September 11, 1930, was not paid on December 15, 1930?

A. There is nothing in here touching on that.

Q. There is no extension, no references to that in that minutes book, other than the resolution declaring the dividend on September 11, 1930?

A. That is right.

Q. You spoke of some loans that were made by the Studios, I believe in your direct testimony?

A. Yes, sir.

Q. Is that reflected in the minutes?

Mr. Diamond: What do you mean by "Studios," Mr. Schmitt?

Mr. Schmitt: By "Studios Corporation" I think he testified that "Studios from time to time had borrowed money."

Mr. Diamond: Yes. [136]

Mr. Schmitt: I may be mistaken in that.

The Witness: That is correct.

Mr. Diamond: He made that statement. But what is your question?

Mr. Schmitt: I am asking him is there anything in the minute book to show that any such loans were made.

Mr. Diamond: I see.

The Witness: There is.

By Mr. Schmitt:

Q. There is? A. Yes, sir.

(Testimony of Marvin A. Ezzell.)

Q. Will you point to it?

A. There is a resolution, dated January 2, 1929, having reference to loans made by Feature Productions to the Studio Corporation.

Q. Does it state any amount?

A. The amount stated is \$25,000 loaned on each of two dates.

Q. \$50,000.

A. Making a total of \$50,000.

Q. Are there any other loans in here?

A. I would have to examine it with that in mind.

There is reference on June 18, 1929, to loans made on June 14, 1929, sir. [137]

Q. I really meant since 1930.

A. I beg your pardon.

Q. That is all right. I really should not have circumscribed it.

A. There is a resolution passed at a meeting on December 12, 1931, authorizing the borrowing of \$25,000 from the Bank of America.

Q. The Bank of America?

A. Yes, sir. Shall I go further?

Q. Yes. Just run through it quickly, not past '33.

A. I do not find any further loans.

Q. That represents them all?

A. I do not say that represents all of them. That represents all that I see, looking through that book.

Q. Do you have any better evidence as to loans, than the minutes?

(Testimony of Marvin A. Ezzell.)

A. I might have something here. I would like to look if I may, at the general ledger. (Consulting book.) I find no others.

Mr. Schmitt: That is all the cross examination I have, if your Honor please.

The Court: Is there any redirect examination of the witness?

Mr. Diamond: Yes. It won't take long, your Honor. I have just a few questions. [138]

Redirect Examination

By Mr. Diamond:

Q. Mr. Ezzell, was there any borrowing by United Artists Studio Corporation, Ltd., in 1931?

A. Yes.

Q. Go ahead.

A. There appears to have been a loan made by the Bank of America in December, 1931.

Mr. Schmitt: Is that the same one referred to in the minutes?

The Witness: I assume that it was, sir.

By Mr. Diamond:

Q. In what amount was that loan, Mr. Ezzell?

A. \$25,000.

Q. Mr. Ezzell, referring now to the debit balances in those accounts receivable from the individual stockholders of United Artists Studio Corporation, Ltd., at my request did you make a computation of the highest amount of those balances in 1930, '31, '32 and '33, 1930 being the portion of 1930 after September 17, and a portion of 1933 up until July 1, 1933?

A. Yes.

(Testimony of Marvin A. Ezzell.)

Q. Will you tell us what the highest amount of the debit balances was in the aggregate in the period between September 17 and December 31, 1930?

A. When you say, "in the aggregate," do you mean by individual companies?

Q. Yes.

A. Well, Mary Pickford Co., November 26, 1930, the amount was \$26,614.32; for 1931, Mary Pickford Co., March 21, 1931, \$4,390.06; Mary Pickford Co., December 31, 1932, \$40,471; Mary Pickford Co., January 21, 1933, \$25,585.56.

Feature Productions, December 3, 1930, \$130,338.41; Feature Productions, February 11, 1931, \$43,489.84; Feature Productions, 1932, December 31, 1932, \$237,456.46; Feature Productions, February 18, 1933, \$240,783.44.

Samuel Goldwyn, Inc., Ltd., September 10, 1930, \$96,593.49.

Mr. Schmitt: Those are Studios' receivables?

The Witness: Yes, sir.

A. (Continuing): Samuel Goldwyn, Inc., Ltd., May 23, 1931, \$38,691.68; Samuel Goldwyn, Inc., Ltd., February 6, 1932, \$95,390.48; Samuel Goldwyn, Inc., Ltd., January 14, 1933, \$116,299.98.

Douglas Fairbanks Co., December 24, 1930, \$3,372.68; for the same company, May 23, 1931, \$1,555.63; for the same company, July 23, 1932, \$22,644.12; and for the same company, May 27, 1933, \$5,695.03. [140]

(Testimony of Marvin A. Ezzell.)

By Mr. Diamond:

Q. Mr. Ezzell, the figures you read for 1930 and for 1933 were for the portion of the year that I indicated to you before you started to answer the question; is that right? In other words, in 1930 the highest debit balance that you gave us for each stockholder would be for that portion of the year which occurred between September 17, 1930, and December 31, 1930? A. That is right.

Q. And that would be true as to 1933; from January 1, 1933, to June 30, 1933?

A. That is right.

Q. And that is according to the records you have before you at this time?

A. That is right.

Q. Mr. Ezzell, in your capacity as auditor of Feature Productions in 1930 was it your responsibility to direct the disposition of the dividend credits on the books of Feature Productions?

A. No.

Q. Whose responsibility was that?

A. That would have been the responsibility of A. M. Brentinger.

Q. Did Mr. Brentinger direct you, as auditor, as to what disposition to make of that dividend credit? [141] A. No.

Q. Do you know of your own knowledge whether any disposition was made of that credit on the books of Feature Productions?

A. I think I understand what you mean. My

(Testimony of Marvin A. Ezzell.)

recollection is that the credit was taken up on the books of Feature Productions—

Mr. Schmitt: If your Honor please, “his recollection was”; that is vague. Besides I think it is immaterial what disposition was made.

Mr. Diamond: I think it has the highest materiality, your Honor. It shows what action was taken with respect to that dividend by the stockholder to whom that dividend went. I think it is highly material.

The Court: What is the basis of the witness' statement?

The Witness: On two things, your Honor. On recollection and upon having seen an accountant's report of Art Cinema Corporation, the parent corporation of Feature Productions, Inc., Ltd., showing that that dividend had been taken in as income. By Mr. Diamond:

Q. In what year?

A. During the fiscal year of Art Cinema Corporation during which the dividend was declared.

Q. What fiscal year would that be, Mr. Ezzell?

A. It would have been the fiscal year ending June 30, 1941.

Q. And that dividend was taken into income by Feature Productions in its fiscal year ending June 30, 1931?

A. That is right.

Mr. Diamond: I have no further questions, your Honor.

(Testimony of Marvin A. Ezzell.)

Recross Examination

By Mr. Schmitt:

Q. Are you positive of that?

A. Positive of that, based on recollection, sir, and on having examined the copy of the accountant's report for that period.

Q. That has been 16 years ago, and you recall that that was returned by Feature Productions?

A. I said based on recollection and on having examined—

Q. I mean are you as positive about that as you can be about anything that happened 16 years ago?

A. Presumably so; practically so.

Q. Everything that you have testified to is on the same basis as your answer to this question here? [143]

A. It is to the best of my knowledge and belief.

Mr. Schmitt: I still think it is immaterial, if your Honor please.

The Court: Objection overruled.

By Mr. Diamond:

Q. Mr. Ezzell, when did you make the examination of the accountant's report?

A. Within the past few days.

By Mr. Schmitt:

Q. Do you have a copy of it?

A. Not with me.

Q. Where is it?

(Testimony of Marvin A. Ezzell.)

A. I do not know whether Mr. Diamond has it or not.

Q. Ask him and see if it is available.

Mr. Diamond: I do not believe that is available, your Honor, and I do not believe that counsel for respondent made any request for it.

By Mr. Schmitt:

Q. Did you have anything to do with the preparation of the Studio 1932 and '33 returns, income tax returns?

Mr. Diamond: When you say "studio," Mr. Schmitt, you mean—

Mr. Schmitt: That is short for United Artists Studio Corporation, and that is what I have meant all during the trial. [144]

A. Yes, sir.

By Mr. Schmitt:

Q. You did? A. Yes.

Q. In the 1932 return of United Artists Studio Corporation, Ltd., about which you said you were familiar with it, how were these dividends declared in 1930 carried on the return balance sheet under item 18?

A. It was carried as a dividend payable.

Q. That amount of \$204,656.67 has been explained as being different from \$203,000 odd by that sum of \$1,565.67 which was washed out?

A. That is right.

Q. And in 1933 return how was it carried in the balance sheet on line 18?

A. As dividends payable.

Q. \$203,091? A. That is right.

(Testimony of Marvin A. Ezzell.)

Q. And at the end of the taxable year, which was the fiscal year ended June 30, 1933, the entry is—
A. Absent.

Q. Absent? A. Yes.

Mr. Schmitt: That is all the examination I have.
By Mr. Diamond:

Q. Mr. Ezzell, I show you photostatic copy of the corporation income tax return for the fiscal year ended June 30, 1931, of United Artists Studio Corporation, Ltd., and ask you to advise me as to what was the amount of surplus of that corporation at the beginning of the said taxable year?

A. \$263,627.79.

Q. And what was the amount of surplus of United Artists Studio Corporation, Ltd., as shown by the aforesaid return as of the end of this taxable year?
A. \$5,891.12.

Q. And what was charged against surplus in that year to account for the discrepancy?

A. There was charged against the surplus for that year the amount of the dividend declared.

Mr. Diamond: I have no further questions, your Honor.

I would like to offer in evidence at this time a letter from C. R. Krigbaum, Internal Revenue agent in charge, addressed to United Artists Studio Corporation, Ltd., under date of April 10, 1933.

The Court: Any objections?

Mr. Schmitt: Yes. I object to that, if your Honor please. [146]

Mr. Diamond: I want to show that the return

(Testimony of Marvin A. Ezzell.)

as to which this witness has been testifying both at the behest of respondent's counsel and at my behest has been accepted by the Bureau of Internal Revenue as correct.

Mr. Schmitt: The return will speak for itself, if your Honor please, and the correspondence and administrative action taken by the Commissioner and others are not competent evidence.

The Court: I think that has been the holding of the Court, that the actions of these representatives is not binding.

Mr. Diamond: I do not ask the Court to do anything except to be advised of the fact that the Bureau of Internal Revenue accepted as correct the income tax return that this witness has testified to.

The Court: May I see it, please?

Mr. Schmitt: I have never heard of that being competent.

Mr. Diamond: There is no reason why this is not competent.

Mr. Schmitt: I am going to introduce the returns.

The Court: This seems to be a formal letter—I sustain the objection.

Mr. Diamond: Mr. Schmitt, if you have nothing further of the witness I would just as soon he be relieved [147] at this time.

Mr. Schmitt: Yes.

The Court: You may step aside.

(Witness excused.)

Mr. Schmitt: Petitioner rests?

Mr. Diamond: Yes, I do.

Mr. Schmitt: Respondent offers in evidence the corporation income tax returns of United Studio Corporation, which name was changed in 1931 to United Artists Studio Corporation, Ltd., for the fiscal year ended June 30, 1930.

The Court: It will be received and marked Respondent's Exhibit A.

(The document referred to was admitted in evidence and marked Respondent's Exhibit A.)

[Respondent's Exhibit A set out in full, on page 162, of this printed record.]

Mr. Schmitt: For the fiscal year ended June 30, 1931.

The Court: Marked Respondent's Exhibit B.

(The document referred to was admitted in evidence and marked Repsondent's Exhibit B.)

[Respondent's Exhibit B set out in full, on page 169, of this printed record.]

Mr. Schmitt: Fiscal year ended June 30, 1932.

The Court: Exhibit C.

(The document referred to was admitted in evidence and marked Respondent's Exhibit C.)

[Respondent's Exhibit C set out in full, on page 178, of this printed record.]

Mr. Schmitt: Fiscal year ended June 30, 1933.

The Court: Exhibit D.

(The document referred to was admitted in evidence and marked Respondent's Exhibit D.)

[Respondent's Exhibit D set out in full, on page 186, of this printed record.]

Mr. Diamond: I have no objection, your Honor.

The Court: They will all be received in evidence and marked as indicated.

Mr. Schmitt: If your Honor please, I think you said on Thursday morning this tabulation will be presented and in the meantime the case will be kept open for the receipt of that evidence.

The Court: Is there any further evidence, other than that which is likely to be offered at that time?

Mr. Schmitt: The respondent has in mind at this time offering the returns of the Feature Productions Company which the witness testified to just now—the treatment of these dividends.

They arrived from Washington about two hours ago, and at that time on Thursday that matter can be taken up.

The Court: Very well.

Mr. Diamond: Will your Honor fix the time for briefs now?

The Court: The usual time. [149]

Mr. Diamond: That will do.

Mr. Schmitt: Yes, the usual time under the rules.

The Court: The court will stand adjourned.

(Whereupon, at 5:20 o'clock p.m., the hearing in the above entitled matter was adjourned to Thursday, Nov. 7, 1946, at 10:00 o'clock a.m.)

[150]

November 7, 1946

The Clerk: 8770, Samuel Goldwyn.

Mr. Schmitt: If your Honor please, you will

recall that this case was partially tried last Monday, the first day of the calendar, and it was held open for two matters; one in respect of some returns which I announced in court had just arrived from Washington, and the other matter was in respect of the accounts of the stockholders of United Artists Studios Corporation.

May I interpolate here to say that previously when I have referred to "Studios" I meant United Artists Studio Corporation.

These stockholders had accounts with Studios, and testimony was given on behalf of the petitioner, making reference to the status of these accounts, and there was also introduced a statement purporting to show the status of these accounts, and the witness had ledger references on the stand.

When I asked, on behalf of respondent, about the years subsequent to 1930 it developed that the witness had not prepared those and was not able, without going through voluminous sheets, to give me the answer, which would take perhaps a couple of hours of the Court's time, the case was held over for that purpose.

The petitioner was to furnish me with statements and [154] give me access to the books, so that my auditor could check the same.

Yesterday, Wednesday afternoon at 1:30, the books were brought up to my office for this tabulation and checking to be made.

And that is where the situation now stands.

And I would like, and have made the request of counsel, to give me some of these records from his

ledger, some of the sheets in respect of these accounts, Feature Productions, Douglas Fairbanks account, Mary Pickford account and Samuel Goldwyn, Inc., Ltd., account.

I think I am correct in stating that counsel—I had those sheets in my possession—and over the telephone, in conversation with Mr. Diamond, he asked me to return them.

I asked to keep them so I could present them in court, and he said—

The Court: Does the Court understand you say that you have not concluded checking these?

Mr. Schmitt: I have concluded checking them, if your Honor please, but I want the sheets, the records.

In other words, your Honor will recall that the petitioner's witness picked out two specific dates, September 17, 1930, and December 15, 1930. [155]

He had a vast number—

The Court: I recall that. I recall that the understanding was that they would furnish you the figures on that, in answer to the question that was made, and also that they would furnish you with the books.

Mr. Diamond: If your Honor please, I would like to interpolate at this point. That is what we did.

If your Honor will recall, Mr. Schmitt wanted the intervening balances made up, and the witness tried during the recess to do so, and was not able to.

We had the witness work on that all of the following day, and on Wednesday morning, yesterday

morning, I called Mr. Schmitt and advised him that the calculations were ready.

I then sent the calculations up to Mr. Schmitt, with the original records from which those calculations were made, and it is my understanding that Mr. Schmitt was satisfied with the computations that were made were correct.

Is that accurate, Mr. Schmitt?

Mr. Schmitt: That is only partially accurate, Mr. Diamond.

Mr. Diamond is under the impression that I asked just one specific question of this witness and that, with this witness, with all the books and records, that that [156] was the only thing I was interested in, that one particular question.

The witness was unable to supply me with answers I was willing to ask and I wanted these books so I could check on them.

When these records were furnished me in respect of these four accounts, I went over them and checked these figures.

In those accounts there appeared certain entries in respect of these accounts that were very germane and were tied in and were absolutely relevant and material to these accounts.

We have the loose sheets. There is no denial that they were regular entries in the course of business.

And I think that there would be a missing link, there would be an incomplete picture.

This Court, in order to make its findings of facts is entitled to have every legitimate book entry that

reflects on this particular item; not just half of it or a third of it, but all of it.

Each item here ties into journal entries and numbers, without which there can be no mistake—

Mr. Diamond: If your Honor please, I might be able to shorten the discussion a bit.

I do not have any desire to debate with Mr. [157] Schmitt what evidence ought to be presented to this Court or withheld from this Court. So far as I am concerned, anything that this Court thinks is relevant and that I have, this Court may have.

I do not agree with Mr. Schmitt as to how much of a trial he can have after the main trial is closed.

In any event, if Mr. Schmitt will tell me what he wants this morning, if I have it, I will be glad to present it.

Mr. Schmitt: You had it yesterday. It is four sheets of the month of May, 1940, which will show the item in respect of the dividends to Feature Productions, Douglas Fairbanks, Mary Pickford—

Mr. Diamond: Are these what you want (handing papers to counsel)?

Mr. Schmitt: Yes, sir.

The Court: What is the situation now?

Mr. Diamond: I do not know what they add to Mr. Schmitt's case, your Honor, but if he thinks they are helpful to this case I will be glad to submit them.

The Court: Do you want to check them?

Mr. Schmitt: I do not want to check them further, if your Honor please.

I would like to offer in evidence, if your Honor

please, the four tabulations which were furnished [158] me by counsel from the books in respect of the accounts of Douglas Fairbanks, Mary Pickford, Samuel Goldwyn, Feature Productions, together with four entries—

From what book would you call this, Mr. Diamond?

Mr. Diamond: Before we get to that, may I make a correction, your Honor?

I did not offer those exhibits that Mr. Schmitt is offering at this point.

I believe they were compiled by the witness and offered by the witness.

The Court: In response to a question by Respondent's counsel, I believe.

Mr. Schmitt: Yes.

Mr. Diamond: That is correct.

I would like to clear the record on that.

Mr. Schmitt: —together with these four sheets in respect of the accounts of Mary Pickford, Douglas Fairbanks, Feature Productions and Samuel Goldwyn, Inc., Ltd.

I think these are ledger sheets.

Do you recall the name of them? Ledger pages?

Mr. Diamond: If your Honor please, I do not see the relevancy of any of these exhibits, but I am not disposed to offer any objection to them.

The Court: They will be received in evidence and [158] marked Respondent's Exhibits E through L.

They are offered by respondent I believe?

Mr. Schmitt: Yes.

The Court: The clerk will properly number them.

(The documents referred to were admitted in evidence and marked Respondent's Exhibits E. to L.)

[Respondent's Exhibits E to L are set out in full at page 193 of this printed record.]

The Court: Is there anything further now?

Mr. Schmitt: Yes, sir. The respondent wishes to offer the returns, income tax returns, together with exhibits attached thereto, for the calendar year 1933, of Mary Pickford Fairbanks and Douglas Fairbanks.

The Court: Is there any objection?

Mr. Diamond: May I see those exhibits?

(Mr. Schmitt hands papers to Mr. Diamond.)

Mr. Schmitt: If your Honor please I would like the privilege of having photostats made of those and substituted.

The Court: Without objection, it is so ordered.

Mr. Diamond: If your Honor please, with respect to the exhibit which is the individual income tax return of Douglas Fairbanks, for the calendar year of 1933, there are a lot of miscellaneous papers attached to the returns, some of which did not form part of the return, originally. [160]

For example, there is a penciled copy of a revenue agent's report, which I think in any event is objectionable.

Mr. Schmitt: I agree to that.

The Court: Only the report itself, and not the correspondence is desired?

Mr. Schmitt: No, sir, there are some exhibits in there—

The Court: But such exhibits as are pertinent. If you can agree on them now, so that there will be no misunderstanding—

Mr. Diamond: If your Honor please, there are several other returns that have been attached to this return. One is an information return of United Artists Studio Corporation, one is an information return of Guaranty Company of New York, and a third is an information return with respect to a Douglas Fairbanks trust.

Mr. Schmitt: Two of those I have no objection to, but that information return, Treasury Department Form 10, Code 99, in respect to the dividends paid by United Artists Studio Corporation to Fairbanks or Pickford, that is required to be attached to it.

Of course, that is a well recognized procedure.

The Court: See if counsel can agree with [161] respect to those.

Mr. Diamond: Your Honor, I am a little doubtful of both of these returns. These are returns of individuals who are not the taxpayers in this case.

The Court: The Court's understanding is that there is a question involved there that this might help to throw light on—

Mr. Diamond: I want it understood that my objection goes to the point that these are private, individual returns of individuals who are not taxpayers in this case and have not given their consent that their returns be disclosed and made public.

Mr. Schmitt: They are controlling stockholders of a closed corporation.

Mr. Diamond: These are not the controlling stockholders, Mr. Schmitt.

This is the return of Douglas Fairbanks for the year 1933, and another return of Mary Pickford Fairbanks for the same year. That is her own, private, confidential return. She is not the taxpayer in this case, and I do not think that confidential information with respect to her income ought to be spread on a public record, without some indication from her that she consents to it.

Mr. Schmitt: Apparently, if counsel will agree to reading into the record the salient points that affect [162] just this distribution, I will agree to that.

The Court: I think if you can agree on that, it would be well.

Mr. Diamond: All right.

Mr. Schmitt: We can do that very hurriedly.

The Court: Yes, you can do that now, and it will save a lot of time.

Mr. Schmitt: I will do the reading, and you can stop me.

Mr. Diamond: I will try.

Mr. Schmitt: It is agreed by counsel for both parties hereto that the following be read into the record and taken as evidence on behalf of respondents:

The individual income tax return for the calendar year 1933 of Douglas Fairbanks on the front page, under

“Income item 10 dividends on stock from domestic corporations \$12,159.55.”

Attached to the return is Form 1099, Treasury Department, Internal Revenue Service information return for the calendar year 1933, to Douglas Fairbanks, 1041 North Formosa Avenue, Los Angeles, California:

“To whom paid”—that is the party to whom it is paid—“kind and amount of income paid dividends \$8,881.91 by whom paid United Artists Studio Corporation, Ltd., 1041 North Formosa Avenue, [163] L.A., California.”

There is a notation under “Dividends”: “See other side.”

On the reverse side there is this:

“In addition to the dividend amount shown hereon there was due the above-named individual an additional dividend of \$14,000 which was paid by the undersigned corporation to Feature Productions, Inc., Ltd., by virtue of an assignment executed by Douglas Fairbanks.”

In respect of the individual income tax return for the calendar year 1933 of Mary Pickford Fairbanks, on the first page under “Income” there is:

“Item 10 Dividend on stock of domestic corporations \$4,586.31.”

Attached to the return is Treasury Department Form 1099 information return for the calendar year 1933:

“To whom paid Mary Pickford Fairbanks, 1041 North Formosa Avenue, Los Angeles, California, Kind and amount of income paid

dividends \$8,881.92 By whom paid United Artists Studio Corporation, Ltd., 1041 North Formosa Avenue, Los Angeles, California. See other side.”

“In addition to the dividend amount shown [164] hereon there was due the above-named individual an additional dividend of \$14,000, which was paid by the undersigned corporation to Feature Productions, Inc., Ltd., by virtue of an assignment executed by Mary Pickford Fairbanks.”

In addition there is also attached a copy of an agreement dated February 4, 1933, between United Artists Studio Corporation, Feature Productions, Inc., Art Cinema Corporation and Mary Pickford Fairbanks and Douglas Fairbanks:

Paragraph 4. “That United Artists Studio Corporation, Ltd., Feature Productions, Inc., Ltd., and Art Cinema Corporation agree to, with the undersigned Mary Pickford Fairbanks, Douglas Fairbanks that the Pickford-Fairbanks Studio and/or Mary Pickford Fairbanks are entitled to and shall retain all of the sums heretofore paid to them or either of them by said Feature Productions, Inc. pursuant to the aforesaid agreement for the purchase and sale of stock between Pickford-Fairbanks Studio Company, Feature Productions, Inc., Douglas Fairbanks, Mary Pickford Fairbanks, Dennis F. O’Brien, Robert Fairbanks, and N. A. McKay, and C. E. Ericksen, dated September 1, 1928, and in addition that the undersigned

Mary Pickford Fairbanks and Douglas [165] Fairbanks are entitled to receive as and when paid the dividend of \$45,763.83 heretofore declared on the aforesaid \$217,923 shares, but not paid by the said United Artists Studio Corporation, less an amount equal to the interest paid by you or any of you to the undersigned for the period from September 10, 1930, to the date when the last interest payment has been made by said Feature Productions, Inc., to the undersigned, that is, September 1, 1932, the agreed amount of interest being \$28,000; and the undersigned Mary Pickford Fairbanks and Douglas Fairbanks do hereby assign to Feature Productions, Inc., so much of the aforesaid dividend as amounts to the sum of \$28,000, leaving the balance of said dividend \$70,763.83 due to the undersigned; and directs United Artists Studio Corporation to pay said amount of \$28,000 as and when said corporation pays the balance of said dividend to the undersigned to Feature Productions, Inc. and accepts the receipt of that corporation as binding upon the undersigned to that portion of said dividend in so far as the interest of the undersigned is concerned therein."

The Court: Does that conclude the reading of the portion you want in?

Mr. Schmitt: Yes, sir. [166]

The Court: Is there anything further?

Mr. Diamond: Will your Honor indulge me for just a moment?

The Court: Surely.

Mr. Schmitt: I would like to have these exhibits, I, J, K and L withdrawn for the purpose of having photostats made, if that is agreeable.

The Court: It will be permitted.

Mr. Diamond: If your Honor please, on behalf of petitioner I desire to offer in evidence at this time corporation income tax return of Art Cinema Corporation and subsidiary companies being a consolidated return for the fiscal year ended June 30, 1931.

The Court: Is there any objection?

Mr. Schmitt: If your Honor please, the same objection that he made. I would like him to read into the record what he wants done.

I am just following his procedure.

Mr. Diamond: I will be very glad to.

The Court: It will probably save encumbering the record with those voluminous reports, if that is done.

Mr. Schmitt: And I would not want the confidential return of a company not involved in this proceeding to be made part of a public record.

Mr. Tannenbaum: If your Honor please, this [167] is a publicly held corporation.

Mr. Diamond: Line 9, page 1 of the return, entitled "Dividends on stock of domestic corporations," reflects the amount of \$146,327.17.

Schedule L-1 of the aforesaid return entitled "Art Cinema Corporation analysis of adjusted surplus year ended June 30, 1931," shows, under the heading of "Additions to surplus," the following:

"Dividends deductible under Section 23SP
(of the Revenue Act of 1928) \$146,327.17."

Schedule H of the aforesaid return of Art Cinema Corporation and subsidiary companies shows the following, under the title of "Dividends deductible."

"1. Name of corporation United Artists Studio Corporation \$136,327.17."

Below that:

"United Artists Corporation \$10,000," making a total of dividends deductible in this schedule of \$146,327.17.

Mr. Schmitt: I would like for you to read into the record—you have read in under No. 9, dividend on stock of domestic corporations \$146,327.17.

I wish you would read under "Deductions," on the same page, under item 19, "Dividends from Schedule H."

Mr. Diamond: Surely. [168]

The same return, your Honor, namely, the return of Art Cinema Corporation and subsidiary companies for the fiscal year ended June 30, 1931, shows, under line 19, under the title of "Deductions," the sum of \$146,327.17 as a deduction on account of dividends.

Mr. Schmitt: Being a corporation, that washes it out.

Mr. Diamond: Yes.

The Court: Is that all?

I believe the motion with reference to briefs was taken care of the other day.

Mr. Diamond: Yes, sir.

Mr. Schmitt: Yes, sir.

Case closed.

[Endorsed]: T.C.U.S. Filed Nov. 25, 1946. [169]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true, provided however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. The petitioner is an individual residing at No. 1200 Laurel Drive, Beverly Hills, California. His income tax returns for the calendar years 1942 and 1943 were filed with the Collector of Internal Revenue for the Sixth District of California.

2. Samuel Goldwyn Studios (formerly known as United Artists Studio Corporation) was a corporation organized under the Laws of the State of California. [170]

3. Samuel Goldwyn Studios maintained its accounts and filed its income tax returns on an accrual basis for a fiscal year ending June 30th.

4. At a special meeting of the Board of Directors of Samuel Goldwyn Studios on November 30, 1942, resolutions were duly adopted to reduce the par value of the capital stock of the Corporation from \$50. to \$10. per share, and to reduce the stated capital of the Corporation. These reductions produced a reduction surplus account of \$870,390.00. Attached hereto and made a part hereof as Joint

Exhibit 1-A is a true and correct copy of these resolutions.

5. On December 14, 1942, petitioner became the owner of all the outstanding Capital Stock of Samuel Goldwyn Studios, and was the owner of said stock on December 31, 1942.

6. On December 31, 1942, pursuant to the resolutions referred to in Paragraph 4, Samuel Goldwyn Studios distributed to the petitioner the sum of \$800,000.00.

7. On June 30, 1930, the earnings and profits of Samuel Goldwyn Studios accumulated since February 28, 1913, including the earnings and profits of \$181,521.28 for the year ended June 30, 1930, were \$286,399.42. [171]

8. On September 11, 1930, the Board of Directors of Samuel Goldwyn Studios adopted the following resolution:

“Resolved that a cash dividend of Twenty One Dollars (\$21.00) per share be, and the same hereby is, declared to all shareholders of this corporation of record as of September 10, 1930, and that said dividend be paid on December 15, 1930.

“Resolved Further that the treasurer of this corporation be, and he hereby is, authorized and instructed to give notice of such dividend and to pay the same when due.”

A true and correct copy of the minutes of said Board of Directors meeting on September 11, 1930

at which said resolution was adopted is attached hereto, made part hereof and marked Joint Exhibit 2-B.

9. On September 17, 1930 the action taken by the aforesaid resolution of September 11, 1930 was reflected by entries on the books of Samuel Goldwyn Studios, photostatic copies of which entries are attached hereto and made a part hereof as Joint Exhibit 3-C. The persons named in such entries are the then stockholders of the corporation and the amounts appearing in such entries are proportionate to the stockholdings of such stockholders.

10. Samuel Goldwyn Studios sustained a statutory net loss of \$97,650.97 in the fiscal year ended June 30, 1931. [172]

11. Samuel Goldwyn Studios sustained a statutory net loss of \$28,475.54 in the fiscal year ended June 30, 1932.

12. Samuel Goldwyn Studios sustained a statutory net loss of \$101,349.36 in the fiscal year ended June 30, 1933.

13. If the accumulated earnings and profits of Samuel Goldwyn Studios were reduced in the fiscal year ended June 30, 1931, by the sum of \$203,091.00 then, of the \$800,000.00 distributed to the petitioner by Samuel Goldwyn Studios on December 31, 1942, \$104,610.56 constituted a distribution of accumulated earnings and profits.

14. If the accumulated earnings and profits and paid-in capital of Samuel Goldwyn Studios were

reduced in the fiscal year ended June 30, 1933 by the said sum of \$203,091.00, then, of the \$800,000.00 distributed to the petitioner by Samuel Goldwyn Studios on December 31, 1942, \$239,059.58 constituted a distribution of accumulated earnings and profits.

/s/ FERDINAND TANNENBAUM,
Counsel for Petitioner.

J. P. WENCHEL,
Chief Counsel, Bureau of
Internal Revenue. [173]

JOINT EXHIBIT 1-A

Now, Therefore, Be It Resolved, that the stated capital of this corporation be and it hereby is reduced from four hundred eighty-three thousand five hundred fifty dollars (\$483,550.00) to ninety-six thousand seven hundred ten dollars (\$96,710.00), the amount of such reduction being three hundred eighty-six thousand eight hundred forty dollars (\$386,840.00);

Resolved Further, that said outstanding par value shares of this corporation of the par value of fifty dollars (\$50.00) each be adjusted to the stated capital of this corporation as reduced by causing each shareholder of this corporation to surrender all of his certificates for outstanding shares and to receive in lieu thereof a certificate for one share of this corporation of the par value of ten dollars (\$10.00) each in lieu of each out-

JOINT EXHIBIT 1-A—(Continued)

standing share of the par value of fifty dollars (\$50.00) each now held by him.

Resolved further, that the officers of this corporation be and they hereby are authorized and directed to procure the approval of this resolution by the vote or written consent of the holders of at least a majority of outstanding shares, regardless of limitations or restrictions on voting rights, and to take such further action as may be necessary or proper to effect the reduction of stated capital hereinbefore in this resolution provided for in accordance with the laws of the State of California.

Resolved Further, that the president or vice president and the secretary of this corporation be and they are hereby authorized, empowered and directed to file with the Division of Corporations of the State of California all applications and to take any and all other steps necessary or proper in their judgment to obtain from said Division of Corporations a permit authorizing this corporation to change the recitals on certificates representing outstanding shares of this corporation to conform to the aforesaid amendment of the articles of incorporation or to exchange new certificates containing recitals conforming to such amendment for outstanding certificates.

Resolved Further, that the following be and it hereby is adopted as the form of stock certificate to be issued hereafter by this corporation. [174]

Resolved Further, that the officers of this cor-

JOINT EXHIBIT 1-A—(Continued)

poration are hereby directed to transfer the surplus resulting from the reduction of the stated capital of this corporation hereinabove effected to a reduction surplus account.

The following resolution was duly and regularly adopted by the affirmative vote of all of the directors present:

Whereas, proceedings have been taken in accordance with the laws of the State of California to reduce the amount of stated capital of this corporation from four hundred eighty-three thousand five hundred fifty dollars (\$483,550.00) to ninety-six thousand seven hundred ten dollars (\$96,710.00) and this reduction, together with a reduction of stated capital of this corporation heretofore made will result in a reduction surplus account amounting to eight hundred seventy thousand three hundred ninety dollars (\$870,390.00); and

Whereas, it is deemed to be to the best interests of this corporation to withdraw and distribute such reduction surplus or some portion thereof pro rata in cash or in property to the shareholders of this corporation;

Now, Therefore, Be It Resolved, that there be withdrawn and distributed out of said reduction surplus to the shareholders of this corporation, in cash and in property or in either, assets of this corporation in the amount of eight hundred thousand dollars (\$800,000.00) or in such lesser amount

JOINT EXHIBIT 1-A—(Continued)

as the board of directors may order at any time hereafter before such distribution is made.

Be It Further Resolved that the board of directors of this corporation hereby determines that by the proposed withdrawal and distribution of such reduction surplus up to but not exceeding eight hundred thousand dollars (\$800,000.00), this corporation will not be rendered unable to satisfy its debts and liabilities when they fall due and that the assets of this corporation after such withdrawal and distribution taken at their fair present value will at least equal one and one-quarter times its debts and liabilities. [175]

Be It Further Resolved, that the president or vice president and the treasurer of this corporation be and they hereby are authorized and directed to file with the Secretary of the State of the State of California at least fourteen days before any such withdrawal and distribution a certificate in compliance with section 348 b of the California Civil Code stating that the matters and things required by said section of such withdrawal and distribution.

Now, Therefore, Be It Resolved, that the stated capital of this corporation be and it hereby is reduced from four hundred eighty-three thousand five hundred fifty dollars (\$483,550.00) to ninety-six thousand seven hundred ten dollars (\$96,710.00), the amount of such reduction being three hundred eighty-six thousand eight hundred forty dollars (\$386,840.00). [176]

JOINT EXHIBIT 2-B

Minutes of Special Meeting of Board of Directors
of United Artists Studio Corporation.

The undersigned, all being directors of United Artists Studio Corporation, a California corporation, and all being present at the office and principal place of business of said corporation at 7200 Santa Monica Boulevard, in the City of Los Angeles, County of Los Angeles, State of California, on September 11, 1930, at the hour of 2:30 o'clock p.m., of said day, do hereby agree and consent that a special meeting of the board of directors of this corporation shall be held immediately at the time and place aforesaid for the purpose of considering and acting upon the proposition of declaring a cash dividend to stockholders of this corporation and for the transaction of any other business which any director may desire to bring before said meeting, hereby waiving any other or further notice of said meeting and agreeing that all of the acts and proceedings of said meeting shall be as valid as though had at a meeting otherwise regularly called and noticed.

In Witness Whereof we have signed this written consent on the record of said meeting on the date and at [177] the time above set forth.

/s/ A. M. BRENTINGER,
ABRAHAM LEHR,
MARK FEILER,
JOHN W. CONSIDINE, JR.,
ROBERT P. FAIRBANKS,
N. A. McKAY.

[178]

JOINT EXHIBIT 2-B—(Continued)

Pursuant to the foregoing written consent signed by a majority of the directors of United Artists Studio Corporation on the record of this meeting, a special meeting of the board of directors of said corporation was held on September 11, 1930, at the hour of 2:30 o'clock p.m., of said day at the office of said corporation at 7200 Santa Monica Boulevard, in the City of Los Angeles, State of California.

The following directors, constituting a majority and a quorum, were present at and participated in said meeting: Robert P. Fairbanks, John W. Considine, Jr., A. M. Brentinger, N. A. McKay, Abraham Lehr, Mark Feiler.

The following directors were absent from said meeting: Joseph M. Schenck.

Mr. Robert Fairbanks, president of the corporation, presided over the meeting. By reason of the absence of the secretary and assistant secretary of the corporation Erwin Luttermoser acted as secretary of the meeting.

The following resolution was duly and regularly adopted by the unanimous vote of all directors present at said meeting:

“Resolved that a cash dividend of Twenty One Dollars (\$21.00) per share be, and the same hereby is, declared to all shareholders of this corporation of record as of September 10, 1930, and that said dividend be paid on December 15, 1930. [179]

JOINT EXHIBIT 2-B—(Continued)

“Resolved Further that the treasurer of this corporation be, and he hereby is, authorized and instructed to give notice of such dividend and to pay the same when due.”

The meeting then adjourned.

/s/ ROBERT FAIRBANKS,
President.

Attest:

/s/ ERWIN LUTTERMOSER,
Acting Secretary. [180]

EXHIBIT 3-C

Prepared by E

Approved by AMB

United Artists Studio Corp.

JOURNAL ENTRY

No. 57

Date: Sept. 7, 1930

| Acct. No. | Description | Debit | ✓ | Credit | ✓ |
|-----------|----------------------------------|----------------------|---|----------------------|---|
| 109 | Surplus | \$204,656.67 | ✓ | | |
| 105 | Dividends Payable: | | | | |
| | Feature Prod. | | | 136,243.17 | ✓ |
| | Joseph M. Schenck | | | 21.00 | ✓ |
| | John W. Considine Jr..... | | | 21.00 | ✓ |
| | A. M. Brentinger | | | 21.00 | ✓ |
| | Mark S. Feiler | | | 21.00 | ✓ |
| | Pickford Fairbanks Studios | | | 3,763.83 | ✓ |
| | Mary Pickford Fairbanks.... | | | 20,979.00 | ✓ |
| | Douglas Fairbanks | | | 20,979.00 | ✓ |
| | N. A. McKay | | | 21.00 | ✓ |
| | Robt. P. Fairbanks | | | 21.00 | ✓ |
| | Samuel Goldwyn, Inc., Ltd. | | | 20,979.00 | ✓ |
| | Abraham Lehr | | | 21.00 | ✓ |
| | Samuel Goldwyn, Inc., Ltd. | | | 1,565.67 | ✓ |
| 187 | Accrued Income Taxes Payable | 1,041.69 | ✓ | | |
| 109 | Surplus | | | 1,041.69 | ✓ |
| 122 | Accrued Income Taxes Payable | 20,341.20 | | | |
| 103 | Gales Haulah—Int. Rev. Collector | | | 20,341.20 | ✓ |
| | (See Vo. 6904) | | | | |

Explanation: Dividend declared to stockholders of record as of Sept. 10, 1930. Payable in cash Dec. 15, 1930—Goldwyn extra dividend of 1565.67 payable by credit memo to be applied to current indebtedness of Goldwyn. See dividend files for detail. Loss for prior year (see Return 6/30/29) not considered in original accrual—6/30/30. Income Tax 1929-1930 payable as per report on file.

[Endorsed]: T.C.U.S. Filed Nov. 4, 1946. [181]

JOINT EXHIBIT 4-D

Prepared by E

Approved by AMB

United Artists Studio Corp., Ltd.

JOURNAL ENTRY

No. 896

Date: May 27, 1933

| Acct. No. | Description | Debit | ✓ | Credit | ✓ |
|-----------|--|--------------|---|-----------|---|
| 105 | Dividends Payable | \$ 28,000.00 | ✓ | | |
| | Mary Pickford Fairbanks and Douglas Fairbanks | | | | |
| 105 | Dividends Payable | | | 28,000.00 | ✓ |
| | Feature Prod. Inc. Ltd. | | | | |

Explanation:

To transfer to Feature Prod. Inc. Ltd. \$28,-000.00 of dividend payable to Mary Pickford Fairbanks and Douglas Fairbanks, leaving amount due last two named \$17,-763.83. This entry per instructions of A. M. Brentinger.

Note:

6/30/33—See agreement between U. A. S. Corp., Feature, Art Cinema, Pickford and Fairbanks dated 2/4/33.

[Endorsed]: T.C.U.S. Admitted in evidence Nov. 4, 1946. [182]

JOINT EXHIBIT 5-E

Prepared by E

Approved by AMB

United Artists Studio Corp., Ltd.

JOURNAL ENTRY

No. 897

Date: May 27, 1933

| Acct. No. | Description | Debit | ✓ | Credit | ✓ |
|-----------|-----------------------------|--------------|---|------------|---|
| 105 | Dividends Payable | \$203,091.00 | ✓ | | |
| | | 197,672.07 | | | |
| 57 | Accounts Receivable | | | | |
| | Feature Prod. Inc. Ltd..... | | | 164,327.17 | ✓ |
| | Samuel Goldwyn Inc. Ltd... | | | 21,000.00 | ✓ |
| | Mary Pickford Fairbanks.. | | | 6,649.57 | ✓ |
| | Douglas Fairbanks | | | 5,695.03 | ✓ |
| | | 5,418.93 | | | |
| 103 | Accounts Payable | | | | |
| | Mary Pickford Fairbanks.. | | | 2,232.05 | ✓ |
| | Douglas Fairbanks | | | 3,186.88 | ✓ |
| | | | | <hr/> | |
| | | | | 203,091.00 | |

Explanation: To charge Accounts Receivable from stockholders against adjusted dividends payable to them and to credit any excess of dividends over such receivables to Accounts Payable. This entry per instructions of A. M. Brentinger.

See letters from Abraham Lehr, Samuel Goldwyn, Inc., Ltd., and Feature Prod. Inc., Ltd., dated 6/27/33 authorizing above—in dividend file.

JOINT EXHIBIT 5-E—(Continued)

United Artists Studio Corp., Ltd.
1041 North Formosa Avenue, Hollywood, Calif.

Invoice No. JE-897

Date: May 27, 1933

To: Feature Productions, Inc., Ltd.

| Description | Total |
|---------------------------------------|--------------|
| To credit your account with amount of | |
| dividend due you | \$136,327.17 |
| | 28,000.00 |
| | 164,327.17 |
| [Initialed]: T E AMB | |

Invoice No. JE-897

United Artists Studio Corp., Ltd.
1041 North Formosa Avenue, Hollywood, California

Date: May 27, 1933

To: Samuel Goldwyn, Inc., Ltd.

| Description | Total |
|---------------------------------------|-----------|
| To credit your account with amount of | |
| dividend due you | 21,000.00 |
| [Initialed]: T E AMB | |

[Endorsed]: T.C.U.S. Admitted in evidence Nov.
4, 1948. [183]

General Ledger

JOINT EXHIBIT 6-F

DIVIDENDS PAYABLE

156

Commissioner of Internal Revenue

| Date | | Description | Posting Ref. | Charges | Credits | Balance |
|----------|--|---|--------------|------------|------------|------------|
| 1930 | | | | | | |
| Sept. 17 | | Feature Prod..... | J57 | ..... | 136,243.17 | ..... |
| | | Joseph M. Schenk..... | " | ..... | 21.00 | ..... |
| | | John W. Considine Jr..... | " | ..... | 21.00 | ..... |
| | | A. M. Brentinger..... | " | ..... | 21.00 | ..... |
| | | Mark S. Feiler..... | " | ..... | 21.00 | ..... |
| | | Pickford Fairbanks Studios..... | " | ..... | 3,763.83 | ..... |
| | | Mary Pickford Fairbanks..... | " | ..... | 20,979.00 | ..... |
| | | Douglas Fairbanks..... | " | ..... | 20,979.00 | ..... |
| | | N. A. McKay..... | " | ..... | 21.00 | ..... |
| | | Robt. P. Fairbanks..... | " | ..... | 21.00 | ..... |
| | | Samuel Goldwyn Inc., Ltd..... | " | ..... | 20,979.00 | ..... |
| | | Abraham Lehr..... | " | ..... | 21.00 | ..... |
| | | Samuel Goldwyn Inc., Ltd..... | " | ..... | 1,565.67 | 204,656.67 |
| 1931 | | | | | | |
| Dec. 12 | | As of June 27, 1931 (S. Goldwyn)..... | J447 | ..... | 1,565.67 | 203,091.00 |
| 1933 | | | | | | |
| May 27 | | Mary Pickford Fairbanks and Douglas Fairbanks..... | J896 | 28,000.00 | ..... | ..... |
| " | | Feature Productions Inc., Ltd..... | J896 | ..... | 28,000.00 | ..... |
| | | | J897 | 203,091.00 | ..... | ..... |
| July 1 | | Mary Pickford Fairbanks and Douglas Fairbanks..... | J926 | ..... | 17,763.83 | ..... |

Joint Exhibit 6-F—(Continued)

| General Ledger | | DIVIDENDS PAYABLE—(Continued) | | Account No. 105 | |
|----------------|--|-------------------------------|------------|-----------------|---------|
| Date | Description | Posting Ref. | Charges | Credits | Balance |
| 1936 | | | | | |
| June 27 | ..... | JR773 | 16,924.25 | ..... | ..... |
|  | ..... | JR718 | ..... | 16,924.25 | ..... |
| 1937 | | | | | |
| July 3 | ..... | JR970 | 135,394.00 | ..... | ..... |
| 1938 | | | | | |
| July 2 | 2.25 per share declared 7/28/38 paid 7/28/38 | J3452 | ..... | 135,394.00 | ..... |
| | Sam'l Goldwyn Inc., Ltd..... | JR1131 | 21,759.75 | ..... | ..... |
| | | J4244 | ..... | 21,759.75 | ..... |
| 1942 | | | | | |
| Nov. 28 | ..... | JR1571 | 170,000.00 | ..... | ..... |
|  | ..... | J6124 | ..... | 170,000.00 | ..... |
| 1943 | | | | | |
| Jan. 2 | ..... | JR1575 | 816,413.49 | ..... | ..... |
|  | ..... | J6140 | ..... | 800,000.00 | ..... |
|  | ..... | J6144 | ..... | 16,413.49 | ..... |

vs. Samuel Goldwyn

[Endorsed]: T.C.U.S. Admitted in evidence Nov. 4, 1946. [186]

PETITIONER'S EXHIBIT No. 1

Feature Productions, Inc.
1041 North Formosa Avenue

Hollywood, Calif., June 27, 1933.

United Artists Studio Corporation, Ltd.
1041 North Formosa Avenue
Los Angeles, California

Gentlemen:

Under the terms of that certain agreement between United Artists Studio Corporation, Feature Productions, Inc., Art Cinema Corporation, and Mary Pickford Fairbanks and Douglas Fairbanks dated February 4, 1933, Mary Pickford Fairbanks and Douglas Fairbanks assigned to Feature Productions, Inc. \$28,000.00 of the dividend declared September 11, 1930 by the board of directors of United Artists Studio Corporation, Ltd. Instead of paying said amount to the undersigned in money, you are hereby authorized to retain said amount to apply on account of the indebtedness now owing from the undersigned to you.

Very truly yours,

FEATURE PRODUCTIONS,
INC. LTD.

By /s/ A. M. BRENTINGER,
Vice-President.

[Endorsed]: T.C.U.S. Admitted in evidence Nov.
4, 1946. [187]

PETITIONER'S EXHIBIT No. 2

Feature Productions, Inc.
1041 North Formosa Avenue

Hollywood, Calif., June 27, 1933.

United Artists Studio Corporation, Ltd.
1041 North Formosa Avenue
Los Angeles, California

Gentlemen:

On September 11, 1930, the board of directors of United Artists Studio Corporation, Ltd., a California corporation, declared a dividend of \$21.00 per share payable to stockholders of record on September 10, 1930. By the declaration of such dividend the undersigned is entitled to receive the sum of \$136,327.17. Instead of paying said amount to the undersigned in money, you are hereby authorized to retain said amount to apply on account of the indebtedness now owing from the undersigned to you.

Very truly yours,

FEATURE PRODUCTIONS,
INC., LTD.

By /s/ A. M. BRENTINGER,
Vice-President.

[Endorsed]: T.C.U.S. Admitted in evidence Nov.
4, 1946. [188]

PETITIONER'S EXHIBIT No. 3

Samuel Goldwyn Inc., Ltd.
Studios - 7210 Santa Monica Boulevard
Los Angeles, California

June 27, 1933.

United Artists Studio Corporation, Ltd.,
1041 North Formosa,
Los Angeles, California.

Gentlemen:

On September 11, 1930, the board of directors of United Artists Studio Corporation, Ltd., a California corporation, declared a dividend of \$21.00 per share payable to stockholders of record on September 10, 1930. By the declaration of such dividend the undersigned is entitled to receive the sum of \$20,979.00. Instead of paying said amount to the undersigned in money you are hereby authorized to retain said amount to apply on account of the indebtedness now owing from the undersigned to you.

Very truly yours,

SAMUEL GOLDWYN, INC., LTD.

By /s/ ABRAHAM LEHR,

Vice President.

[189]

[Endorsed]: T.C.U.S. Admitted in evidence Nov. 4, 1946.

PETITIONER'S EXHIBIT No. 4

Samuel Goldwyn Inc., Ltd.
Studios - 7210 Santa Monica Boulevard
Los Angeles, California

June 27, 1933.

United Artists Studio Corporation, Ltd.,
1041 North Formosa,
Los Angeles, California.

Gentlemen:

On September 11, 1930, the board of directors of United Artists Studio Corporation, Ltd., a California corporation, declared a dividend of \$21.00 per share payable to stockholders of record on September 10, 1930. By the declaration of such dividend the undersigned is entitled to receive the sum \$21.00. Instead of paying said amount to the undersigned in money, you are hereby authorized to retain said amount to apply on account of the indebtedness now owing from Samuel Goldwyn Inc.. Ltd. to you.

Very truly yours,

/s/ ABRAHAM LEHR.

[Endorsed]: T.C.U.S. Admitted in evidence Nov.
4, 1946. [190]



CORPORATION INCOME TAX RETURN

For Fiscal Year 1930

Fiscal Year began July 1, 1929, and ended June 30, 1930.
 Was This Return Not Later Than the Fifteenth Day of the Third Month Following the Close of the Fiscal Year?

THE LIBRARY OF THE
U. S. DEPARTMENT OF
THE ARMY

ADDITIONAL

For Liability

303253

Page 1 of 10 pages

400018

三

Total Disbursements in 1970 13 to 23

Net Income (Item 11 minus Item 23)

COMPUTATION OF TAX

| | | | | | | | | |
|---|----|-----|-----|----|----|----|-----|----|
| Income (Item 24, above) | \$ | 176 | 000 | 05 | \$ | 21 | 325 | 00 |
| Less Credit of \$2,000 (for a domestic corporation in net income of less than \$25,500) | | | | | | | | |
| Net income (Item 25, above) | \$ | 176 | 000 | 05 | \$ | 21 | 325 | 00 |
| Less 10% of Item 27 | \$ | 19 | 454 | 80 | \$ | 9 | 788 | 40 |
| Net income (Item 26, above) | \$ | 156 | 545 | 25 | \$ | 10 | 536 | 60 |
| Less 10% of 1920 net income (Item 26 plus Item 27) | \$ | 19 | 454 | 80 | \$ | 20 | 341 | 80 |
| Net income (Item 24, above) | \$ | 176 | 000 | 05 | \$ | 20 | 341 | 80 |
| Less Credit of \$2,000 (for a domestic corporation in net income of less than \$25,500) | | | | | | | | |
| Net income (Item 26) | \$ | 176 | 000 | 05 | \$ | 20 | 341 | 80 |

...to be "important" persons in your

Checks and drafts will be accepted only if payee's name is

Page 2 of Return

SCHEDULE K—BALANCE SHEETS (See Instruction 43)

Respondent's Exhibit A—(Continued)

| Items | Beginning of Taxable Year | | End of Taxable Year | |
|---------------------------------|---------------------------|--------------|---------------------|--------------|
| | Amount | Total | Amount | Total |
| ASSETS | | | | |
| 1. Cash..... | ..... | \$ 69,832.45 | ..... | \$ 45,105.45 |
| 3. Accounts receivable..... | \$250,539.38 | ..... | \$ 80,390.94 | ..... |
| Less reserve for bad debts..... | ..... | 250,539.38 | ..... | 80,390.94 |
| 4. Supplies..... | \$ 28,339.46 | ..... | \$ 41,932.41 | ..... |
|  | ..... | 28,339.46 | ..... | 41,932.41 |
| 7. Deferred charges: | | | | |
| Prepaid insurance..... | \$ 8,997.87 | ..... | \$ 17,593.00 | ..... |
| Prepaid taxes..... | 717.07 | ..... | 349.00 | ..... |
| All other..... | 2,635.56 | 12,350.50 | 5,837.44 | 23,779.44 |
| 8. Capital assets: | | | | |
| Buildings..... | \$500,907.29 | ..... | \$ 880,986.17 | ..... |
| Machinery and equipment..... | 303,074.78 | ..... | 500,932.04 | ..... |
| Furniture and fixtures..... | 60,461.39 | ..... | 68,784.79 | ..... |
| Delivery equipment..... | 14,754.58 | ..... | 17,436.21 | ..... |

vs. Samuel Goldwyn

Respondent's Exhibit A—(Continued)

Page 2 of Return—(Cont'd)

Schedule K—Balance Sheets—(Cont'd)

| Items | Beginning of Taxable Year | | End of Taxable Year | |
|---|---------------------------|-----------------|---------------------|-----------------|
| | Amount | Total | Amount | Total |
| ASSETS—(Cont'd) | | | | |
| Leasehold Improvements..... | 108,221.65 | ..... | 139,282.42 | ..... |
| Leased Equipment..... | ..... | ..... | 335,947.30 | ..... |
| | <hr/> | | <hr/> | |
| | \$987,419.69 | ..... | \$ 1,943,368.93 | ..... |
| Less reserves for depreciation..... | 344,323.91 | 643,095.78 | 689,564.93 | 1,253,804.00 |
| | <hr/> | | <hr/> | |
| 11. Other assets (describe fully) : | | | | |
| Accrued Interest Receivable..... | \$ 1,753.89 | ..... | ..... | ..... |
| Deposits on Option Land Pur..... | ..... | ..... | \$ 43,637.51 | ..... |
| Sound Department..... | 549,783.98 | ..... | ..... | ..... |
| Music Department..... | 3,586.06 | 555,123.93 | ..... | 43,637.51 |
| | <hr/> | | <hr/> | |
| 12. Total Assets..... | ..... | \$ 1,559,281.50 | ..... | \$ 1,488,649.75 |
| LIABILITIES | | | | |
| 13. Notes payable (less than one year)..... | ..... | \$ 240,792.28 | ..... | \$ 19,050.00 |
| 14. Accounts payable..... | ..... | 162,957.50 | ..... | 87,513.97 |

Respondent's Exhibit A—(Continued)

Page 2 of Return—(Cont'd)

Schedule K—Balance Sheets—(Cont'd)

| | Beginning of Taxable Year | | End of Taxable Year | |
|---|---------------------------|-----------------|---------------------|-----------------|
| | Amount | Total | Amount | Total |
| LIABILITIES—(Cont'd) | | | | |
| 17. Accrued expenses: | | | | |
| Interest..... | \$ 4,754.16 | ..... | \$ 39.00 | ..... |
| Taxes..... | | | 20,341.20 | ..... |
| All other..... | 13,441.13 | 18,195.29 | 17,870.75 | 38,250.95 |
| 18. Other liabilities (describe fully): | | | | |
| Refunds Due Producers..... | \$132,100.17 | ..... | \$ 148,001.55 | ..... |
| Capital Stock Subscriptions..... | 39,900.00 | ..... | 59,900.00 | ..... |
| Deferred Income..... | ..... | ..... | 5,000.00 | ..... |
| Unclaimed Salaries and Wages..... | 105.49 | 172,105.66 | 105.49 | 213,007.04 |
| 19. Capital stock: | | | | |
| Common stock (less stock in treasury) ..... | ..... | 867,200.00 | ..... | 867,200.00 |
| 20. Surplus..... | \$ 98,030.77 | ..... | \$ 98,030.77 | ..... |
| 21. Undivided profits..... | ..... | 98,030.77 | 165,597.02 | 263,627.79 |
| 22. Total Liabilities..... | ..... | \$ 1,559,281.50 | ..... | \$ 1,488,649.75 |

vs. Samuel Goldwyn

Respondent's Exhibit A—(Continued)

Page 3 of Return

SCHEDULE L—Reconciliation of Net Income and Analysis
of Changes in Surplus

| | |
|---|--------------|
| 1. Net income from Item 24, page 1 of the return..... | \$176,880.03 |
| * * * * | |
| 5. Total of Lines 1 to 4, inclusive..... | \$176,880.03 |
| 6. Total from Line 14..... | 20,341.20 |
| 7. Net profit for year, as shown by books, before any adjustments are made therein (Line 5 minus Line 6) | \$156,538.83 |
| 8. Surplus and undivided profits as shown by bal- ance sheet at close of preceding taxable year.... | 98,030.77 |
| 9. Other credits to surplus (to be detailed): | |
| (a) Net Loss for Prior Year..... | 9,058.19 |
| 10. Total of Lines 7 to 9, inclusive..... | \$263,627.79 |
| * * * * | |
| 12. Surplus and undivided profits as shown by bal- ance sheet at close of taxable year (Line 10 minus Line 11) | \$263,627.79 |
| 13. Unallowable deductions: | |
| (b) Income and profits taxes paid to the United States, and so much of such taxes paid to its possessions or foreign countries as are claim- ed as a credit in Item 41, page 1 of the return | 20,341.20 |
| 14. Total of Line 13..... | \$ 20,341.20 |
| * * * * | |

QUESTIONS

KIND OF BUSINESS

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

* * * * E4.—Leasing transportation or utilities. State kind of property. * * * *

Respondent's Exhibit A—(Continued)

3. Answers: (a) General class (use key letter designation) E-4. (b) Main income-producing business (give specifically the information called for under each key letter, also whether acting as principal, or as agent on commission; state if inactive or in liquidation) : Leasing Space and Facilities for Production of Motion Pictures.

AFFILIATIONS WITH OTHER CORPORATIONS

See Instruction 38

4. Is this a consolidated return of two or more corporations?
No.

5. Did the corporation file a consolidated return for the preceding taxable year? No.

PREDECESSOR BUSINESS

6. Did the corporation file a return under the same name for the preceding taxable year? Yes. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? Yes. If answer is "yes," give name and address of each predecessor business, and the date of the change in entity: Pickford-Fairbanks Studios Company, November 22, 1926.

BASIS OF RETURN

7. Is this return made on the basis of actual receipts and disbursements? Yes.

VALUATION OF INVENTORIES

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock: Inventories Valued at Cost. Taken June 30, 1930.

LIST OF ATTACHED SCHEDULES

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return:

Schedule of Cost of Goods Sold

Schedule of Cost of Manufacturing

Schedule of Profit from Sale of Capital Assets

Respondent's Exhibit A—(Continued)

Schedule of Other Deductions

Schedule of Compensation of Officers

Schedule of Repairs

Schedule of Taxes

Schedule of Bad Debts

Schedule of Depreciation

The corporation's books are in care of Erwin Luttermoser. Located at 1041 No. Formosa Ave., Hollywood, Calif.

Page 4 of Return

AFFIDAVIT

We, the undersigned, vice-president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

(Corporate Seal)

/s/ A. M. BRENTINGER,
Vice-President.

/s/ [Illegible]
Asst. Treasurer.

Sworn to and subscribed before me this 12th day of September, 1930.

(Seal) /s/ ERWIN LUTTERMOSER,
Notary Public in and for the City and County of Los Angeles,
State of California.

My Commission Expires Dec. 19, 1931.

[Endorsed]: T.C.U.S. Admitted in evidence Nov.
4, 1946. [194]

Respondent's Exhibit B—(Cont'd)

Page 2 of Return

SCHEDULE K—BALANCE SHEETS (See instruction 43)

Items

Beginning of Taxable Year

End of Taxable Year

ASSETS

Amount

Total

Amount

Total

1. Cash.....

\$

80,390.94

\$

45,105.45

\$

146,598.91

\$

88,589.72

3. Accounts receivable.....

\$

80,390.94

\$

146,598.91

146,549.41

Less reserve for bad debts.....

.....

80,390.94

146,549.41

4. Inventories:

Raw materials.....

\$

39,762.75

\$

50,441.51

.....

Work in process.....

\$

1,928.17

2,255.10

.....

Supplies.....

\$

2,169.66

5,284.62

.....

43,860.58

57,981.23

7. Deferred charges:

Prepaid insurance.....

\$

17,593.00

\$

21,703.31

.....

Prepaid taxes.....

\$

349.00

342.00

.....

All other.....

\$

3,909.27

21,851.27

610.77*

21,434.54

Respondent's Exhibit B—(Cont'd)

Schedule K—Balance Sheets—(Cont'd)

Page 2 of Return—(Cont'd)

| Items | Beginning of Taxable Year | | End of Taxable Year | |
|---|---------------------------|-----------------|------------------------|-----------------|
| | Amount | Total | Amount | Total |
| ASSETS—(Cont'd) | | | | |
| 8. Capital assets: | | | | |
| Land (Leased)..... | ..... | ..... | ..... | ..... |
| Buildings and Leasehold Improvements...\$ | 1,020,268.59 | ..... | \$ 1,051,638.22 | ..... |
| Machinery and equipment..... | 817,446.43 | ..... | 929,682.84 | ..... |
| Furniture and fixtures..... | 68,784.79 | ..... | 72,916.80 | ..... |
| Delivery equipment..... | 36,869.09 | ..... | 37,892.09 | ..... |
| | <u>\$ 1,943,368.90</u> | <u>.....</u> | <u>\$ 2,092,129.95</u> | <u>.....</u> |
| Less reserves for depreciation..... | 689,564.90 | 1,253,804.00 | 992,902.03 | 1,099,227.92 |
| | <u>.....</u> | <u>.....</u> | <u>.....</u> | <u>.....</u> |
| 11. Other assets (describe fully): | | | | |
| Deposit to be applied on purchase of land | | | | |
| if option to purchase is exercised.....\$ | 43,637.51 | 43,637.51 | \$ 43,718.74 | 43,718.74 |
| | <u>.....</u> | <u>.....</u> | <u>.....</u> | <u>.....</u> |
| 12. Total Assets..... | ..... | \$ 1,488,649.75 | ..... | \$ 1,457,501.56 |
| LIABILITIES | | | | |
| 13. Notes payable (less than one year)..... | ..... | \$ 19,050.00 | ..... | \$ 15,000.00 |
| 14. Accounts payable..... | ..... | 95,135.00 | ..... | 183,628.07 |

LIABILITIES—(Cont'd)

17. Accrued expenses:

| | | |
|----------------|-----------|-----------|
| Interest..... | \$ 39.00 | ..... |
| Taxes..... | 20,341.20 | ..... |
| All other..... | 1,176.11 | 21,556.31 |

18. Other liabilities (describe fully):

| | | |
|------------------------------------|-------------|------------|
| Dividends Payable..... | ..... | ..... |
| Contracts Payable..... | \$ 9,179.10 | ..... |
| Refunds Due Tenants..... | 148,001.55 | ..... |
| Deferred Income (Music Dept.)..... | 5,000.00 | 162,180.65 |

19. Capital stock:

| | | |
|--|---------------|------------|
| Common stock (less stock in treasury)..... | \$ 927,100.00 | 927,100.00 |
|--|---------------|------------|

20. Surplus.....

\$ 263,627.79

21. Undivided profits.....

.....

22. Total Liabilities.....

\$ 1,488,649.75

* This item includes suspense accounts 4,398.57. Pending adjustment on completion of this year's program of motion pictures lessees on premises have been overcharged for services in this amount. Sales were correspondingly credited.

vs. Samuel Goldwyn

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End of Taxable Year

Total

Amount

Total

Amount

\$

19.74

.....

2,836.75

\$

204,656.67

.....

.....

123,058.92

.....

327,715.59

\$

967,100.00

967,100.00

\$

58,971.12

.....

97,700.47

38,729.35

\$ 1,457,501.56

Respondent's Exhibit B—(Cont'd)

Page 3 of Return

SCHEDULE L—Reconciliation of Net Income and Analysis
of Changes in Surplus

| | |
|---|--------------|
| 1. Net income from Item 24, page 1 of the return.... | \$ 97,650.97 |
| * * * * | |
| 5. Total of Lines 1 to 4, inclusive..... | \$ 97,650.97 |
| 6. Total from Line 14 | \$ 49.50 |
| 7. Net profit for year, as shown by books, before any adjustments are made therein (Line 5 minus Line 6) | \$ 97,700.47 |
| 8. Surplus and undivided profits as shown by bal- ance sheet at close of preceding taxable year.... | 263,627.79 |
| * * * * | |
| 10. Total of Lines 7 to 9, inclusive..... | \$165,927.32 |
| 11. Total from Line 17..... | 204,656.67 |
| 12. Surplus and undivided profits as shown by bal- ance sheet at close of taxable year (Line 10 minus Line 11) | \$ 38,729.35 |
| 13. Unallowable deductions: | |
| (b) Income and profits taxes paid to the United States, and so much of such taxes paid to its possessions or foreign countries as are claim- ed as a credit in Item 32, page 1 of the return | 49.50 |
| 14. Total of Line 13..... | \$ 49.50 |
| * * * * | |
| 16. Other debits to surplus (to be detailed): | |
| (a) Dividends declared 9/10/30 but unpaid on 6/30/31 | \$204,656.67 |
| 17. Total of Lines 15 and 16..... | \$204,656.67 |

QUESTIONS

KIND OF BUSINESS

1. By means of the key letters given below, identify the corporation's main income producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

Respondent's Exhibit B—(Cont'd)

* * * * D—Construction—excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations.

* * * * G—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. State the service. * * *

3. Answers: (a) General class (use key letter designation) D & G. (D) Construction of motion picture sets, props, wardrobe—of common building materials; (G) Providing services as designers and active operators of motion picture sets and equipment.

AFFILIATIONS WITH OTHER CORPORATIONS

See Instruction 38

4. Is this a consolidated return of two or more corporations? No.

5. Did the corporation file a consolidated return for the preceding taxable year? No.

PREDECESSOR BUSINESS

6. Did the corporation file a return under the same name for the preceding taxable year? No. Was the corporation in any way an outgrowth, result, continuance, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? Yes. If answer is "yes," give name and address of each predecessor business, and the date of the change in entity: The corporation changed its name from United Artists Studio Corporation to United Artists Studio Corporation, Ltd. within the taxable year.

BASIS OF RETURN

7. Is this return made on the basis of actual receipts and disbursements? Yes.

VALUATION OF INVENTORIES

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock: Cost or market, whichever is lower.

Respondent's Exhibit B—(Cont'd)

LIST OF ATTACHED SCHEDULES

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return.

Schedule "I" "Depreciation"

Schedule "X" "General Expense"

Schedule "G" "Bad Debts"

The corporation's books are in care of L. B. Smith, Auditor. Located at 1041 No. Formosa Ave., Los Angeles, Calif.

Page 4 of Return

SCHEDULE A—Cost of Manufacturing or Producing Goods
(See Instruction 2)

| Items | Amount (Enter as Item 2c) |
|---|------------------------------|
| Cost of Salaries and Wages Sold..... | \$641,690.45 |
| Wages and Material: | |
| Wardrobe Manufacture | 26,384.81 |
| Photographic Depts. | 47,861.85 |
| Transportation Dept. | 18,359.35 |
| Dining Room | 9,137.53 |
| Wages, demolishing unused mot. pic. sets..... | 1,461.23 |
| * * * * | <hr/> |
| | \$744,895.22 |

SCHEDULE C—Compensation of Officers (See Instruction 12)

1. Name of Officer: A. M. Brentinger. 2. Official Title: Vice Pres.
3. Time Devoted to Business: $\frac{3}{4}$. 4. Shares of Stock Owned: 1
Common. 5. Preferred: None. 6. Amount of Compensation (enter as Item 12): \$15,600.00.

SCHEDULE D—Cost of Repairs and Maintenance

| 1. Items | 2. Amount (Enter as Item 14) |
|---|---------------------------------|
| Buildings and Grounds | \$ 25,214.30 |
| Rental Equipment (Lights, Cameras, etc.)..... | 22,381.80 |
| Machinery, Tools, Projection Equipment..... | 7,140.49 |
| Furniture and Fixtures | 6,599.54 |
| Recording Equipment | 13,094.47 |
| Autos and Miscellaneous | 7,769.19 |

Respondent's Exhibit B—(Cont'd)

SCHEDULE E—Taxes Paid (See Instruction 16)

| 1. Items | 2. Amount (Enter as Item 16) |
|-------------------------------------|---------------------------------|
| State Franchise Tax Bill 27970..... | \$ 1,854.96 |
| City & County Tax Bill 767502½..... | 1,216.80 |
| do 861096..... | 40.83 |
| do 354121..... | 5,926.33 |
| do 767500..... | 17,597.26 |
| do 555182..... | 4,285.64 |
| City License | 400.00 |
| Auto Licenses | 292.00 |

* * * *

AFFIDAVIT

We, the undersigned, president and treasurer of the corporation for which this return is made, being severally, duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

(Corporate Seal) /s/ R. FAIRBANKS,
President.

/s/ A. M. BRENTINGER,
Treasurer.

Sworn to and subscribed before me this 12th day of October, 1931.

(Seal) /s/ W. SMITH,
Notary Public in and for the City and County of Los Angeles,
California.

[Endorsed]: T.C.U.S. Admitted in evidence Nov. 4, 1946. [198]

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY
JANUARY 1950

TO THE HONORABLE CHAIRMAN OF THE BOARD OF TRUSTEES
OF THE UNIVERSITY OF CHICAGO
FROM THE DEPARTMENT OF CHEMISTRY
SUBJECT: REPORT ON THE PROGRESS OF THE RESEARCH
DURING THE YEAR 1949

The following is a summary of the work done in the Department of Chemistry during the year 1949. The work was carried out under the direction of the Department Head, Professor [Name], and the assistance of the following staff: [List of staff members].

The work was carried out in the following areas:

- 1. [Area 1]
- 2. [Area 2]
- 3. [Area 3]
- 4. [Area 4]
- 5. [Area 5]

The results of the work are summarized in the following table:

| Area | Project | Progress |
|-------------|---------------|----------------|
| 1. [Area 1] | [Project 1.1] | [Progress 1.1] |
| | [Project 1.2] | [Progress 1.2] |
| 2. [Area 2] | [Project 2.1] | [Progress 2.1] |
| | [Project 2.2] | [Progress 2.2] |
| 3. [Area 3] | [Project 3.1] | [Progress 3.1] |
| | [Project 3.2] | [Progress 3.2] |
| 4. [Area 4] | [Project 4.1] | [Progress 4.1] |
| | [Project 4.2] | [Progress 4.2] |
| 5. [Area 5] | [Project 5.1] | [Progress 5.1] |
| | [Project 5.2] | [Progress 5.2] |

The work was carried out in the following laboratories:

- 1. [Lab 1]
- 2. [Lab 2]
- 3. [Lab 3]
- 4. [Lab 4]
- 5. [Lab 5]

The work was carried out in the following buildings:

- 1. [Building 1]
- 2. [Building 2]
- 3. [Building 3]
- 4. [Building 4]
- 5. [Building 5]

The work was carried out in the following rooms:

- 1. [Room 1]
- 2. [Room 2]
- 3. [Room 3]
- 4. [Room 4]
- 5. [Room 5]

The work was carried out in the following offices:

- 1. [Office 1]
- 2. [Office 2]
- 3. [Office 3]
- 4. [Office 4]
- 5. [Office 5]

The work was carried out in the following spaces:

- 1. [Space 1]
- 2. [Space 2]
- 3. [Space 3]
- 4. [Space 4]
- 5. [Space 5]

The work was carried out in the following areas:

- 1. [Area 1]
- 2. [Area 2]
- 3. [Area 3]
- 4. [Area 4]
- 5. [Area 5]

The work was carried out in the following locations:

- 1. [Location 1]
- 2. [Location 2]
- 3. [Location 3]
- 4. [Location 4]
- 5. [Location 5]

The work was carried out in the following regions:

- 1. [Region 1]
- 2. [Region 2]
- 3. [Region 3]
- 4. [Region 4]
- 5. [Region 5]

The work was carried out in the following countries:

- 1. [Country 1]
- 2. [Country 2]
- 3. [Country 3]
- 4. [Country 4]
- 5. [Country 5]

The work was carried out in the following continents:

- 1. [Continent 1]
- 2. [Continent 2]
- 3. [Continent 3]
- 4. [Continent 4]
- 5. [Continent 5]

The work was carried out in the following world:

- 1. [World 1]
- 2. [World 2]
- 3. [World 3]
- 4. [World 4]
- 5. [World 5]

CORPORATION INCOME TAX RETURN For Fiscal Year 1932

Fiscal Year begins JULY 1, 1932, and ended JUNE 30, 1933
File This Return Not Later Than the Fourth Day of the Third Month Following the Close of the Fiscal Year

PRINT PLAINLY IN INK—GIVE NAMES AND RESIDENCE ADDRESS

UNITED ARTISTS STUDIO CORPORATION, INC.

1041 North Normandie Avenue

Los Angeles, California

Date of Incorporation November 12, 1932

1120-A

SEP 14 1937

COLL. TAX. BUREAU

LOS ANG.

Under the Laws of the State of California

End of Business Motion Picture Rental Studio In This a Combined Return of Two or More Corporations, Etc. If Not

GROSS INCOME

1. Gross Sales from Trading 805,568.02 Less Returns and Refunds 0 Net 805,568.02

2. Less Cost of Goods Sold:

(a) Inventory at beginning of year 0 "C" or "P" 0

(b) Merchandise bought for sale 135,733.33

(c) Cost of manufacturing or producing goods from business at 0

(d) Depreciation on 0 Total 135,733.33

(e) Total of items (a), (b), and (c) 135,733.33

(f) Less Inventory at end of year 0 "C" or "P" 0

3. Gross Profit from Trading or Manufacturing (Item 1 minus Item 2) 669,834.69

4. Gross Profit from Operations Other Than Trading or Manufacturing 0

(a) Charges for studio facilities based on sound recording time 0

(b) 0

5. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds 0

6. Rent of equipment, office space and studio space 0

7. Royalties 0

8. Dividends on Stock of Domestic Corporations 0

9. Other Income (including dividends received on Stock of foreign corporations). State nature of income 0

(a) Discounts on purchases 0

(b) Return of portion of premium paid on Motion Picture Corporation 0

(c) Policy in prior year 0

Total Income in Items 1 to 10 669,834.69

DEDUCTIONS

11. Compensation of Officers 0

12. Rent on Business Property 0

13. Repairs (Item 12 minus 11); Salaries and Wages 0 Other Costs 0 Total 0

14. Interest 0

15. Taxes (Item 12 minus 11) 0

16. Depreciation (Item 12 minus 11) 0

17. Losses from Insurance 0

18. Bad Debts (Item 12 minus 11) 0

19. Dividends (Item 12 minus 11) 0

20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (Item 12 minus 11) 0

21. Replicas of Movies, Oil and Gas Wells, Tunnels, etc. (Excluded deduction on Item 12) 0

22. Other Deductions Not Specified Above. (Explain nature of deduction on Item 12) 0

(a) Salaries and wages (Item 12 minus 11 or 11 minus 12) 0

(b) Not Less for 1932-1933 (Explain deduction) 0

(c) Operating Expenses (Explainable) 0

(d) 0

Total Deductions in Items 11 to 22 0

Net Income (Item 11 minus Item 22) 669,834.69

COMPUTATION OF TAX

23. Net Income (Item 22 above) 669,834.69 Less Income Tax (19% of Item 22) 127,278.59 Total 797,113.28

24. Balance of Tax (Item 23 minus Item 22) 127,278.59

25. Balance of Tax (Item 24 minus Item 23) 0

26. Balance of Tax (Item 25 minus Item 24) 0

27. Balance of Tax (Item 26 minus Item 25) 0

28. Balance of Tax (Item 27 minus Item 26) 0

29. Balance of Tax (Item 28 minus Item 27) 0

30. Balance of Tax (Item 29 minus Item 28) 0

31. Balance of Tax (Item 30 minus Item 29) 0

32. Balance of Tax (Item 31 minus Item 30) 0

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if

Respondent's Exhibit C—(Cont'd)

Page 2 of Return

SCHEDULE K—BALANCE SHEETS (See Instruction 43)

| Items | Beginning of Taxable Year | | End of Taxable Year | |
|---------------------------------|---------------------------|--------------|---------------------|--------------|
| | Amount | Total | Amount | Total |
| ASSETS | | | | |
| 1. Cash..... | ..... | \$ 88,589.72 | ..... | \$ 33,200.29 |
| 2. Notes receivable..... | ..... | ..... | ..... | 200.00 |
| 3. Accounts receivable..... | \$ 146,598.91 | ..... | \$ 178,796.59 | ..... |
| Less reserve for bad debts..... | ..... | 146,598.91 | ..... | 178,796.59 |
| 4. Inventories: | \$ 50,441.51 | ..... | ..... | ..... |
| Raw materials..... | 2,255.10 | ..... | \$ 81.18 | ..... |
| Work in progress..... | 5,284.62 | ..... | 47,831.70 | ..... |
| Supplies..... | ..... | 57,981.23 | ..... | 47,912.88 |
| 7. Deferred charges: | | | | |
| Prepaid insurance..... | \$ 21,703.31 | ..... | \$ 21,109.04 | ..... |
| Prepaid taxes..... | 342.00 | ..... | 304.50 | ..... |
| All other..... | 610.77 | 21,434.54 | 27,930.09 | 49,343.63 |

Respondent's Exhibit C—(Cont'd)

Schedule K—Balance Sheets—(Cont'd)

Page 2 of Return—(Cont'd)

| Items | Beginning of Taxable Year | | End of Taxable Year | |
|--|---------------------------|-----------------|---------------------|-----------------|
| | Amount | Total | Amount | Total |
| ASSETS—(Cont'd) | | | | |
| 8. Capital assets: | | | | |
| Land (Leased) | | | | |
| Buildings and Leasehold Improvements..... | \$ 1,051,638.22 | ..... | \$ 1,057,989.67 | ..... |
| Machinery and equipment..... | 929,682.84 | ..... | 976,937.42 | ..... |
| Furniture and fixtures..... | 72,916.80 | ..... | 73,182.45 | ..... |
| Delivery equipment..... | 37,892.09 | ..... | 21,529.98 | ..... |
| | | | | |
| | \$ 2,092,129.95 | ..... | \$ 2,129,639.52 | ..... |
| Less reserves for depreciation..... | 992,902.03 | 1,099,227.92 | 1,266,858.54 | 862,780.98 |
| 11. Other assets (describe fully): | | | | |
| Deposit to be applied on purchase of land if option to purchase is exercised..... | \$ 43,718.74 | 43,718.74 | \$ 43,718.74 | 43,718.74 |
| 12. Total Assets..... | | \$ 1,457,551.06 | | \$ 1,215,953.11 |

Respondent's Exhibit C—(Cont'd)

Schedule K—Balance Sheets—(Cont'd)

Page 2 of Return—(Cont'd)

| Beginning of Taxable Year | | End of Taxable Year | |
|---|---------------|---------------------|-----------------|
| | Amount | Amount | Total |
| LIABILITIES | | | |
| 13. Notes payable (less than one year)..... | | | |
| 14. Accounts payable..... | | \$ 15,000.00 | |
| 17. Accrued expenses: | | 183,628.07 | |
| Interest..... | 19.74 | | |
| All other..... | 2,817.01 | | 2,836.75 |
| | | | |
| 18. Other liabilities (describe fully) : | | | |
| Dividends Payable..... | \$ 204,656.67 | | |
| Refunds due tenants..... | 123,058.92 | | 327,715.59 |
| | | | |
| 19. Capital stock: | | | |
| Common stock (less stock in treasury)..... | \$ 967,100.00 | | 967,100.00 |
| | | | |
| 20. Surplus..... | \$ 58,971.12 | | |
| 21. Undivided profits..... | 97,700.47 | | 38,729.35 |
| | | | |
| 22. Total Liabilities..... | | | \$ 1,457,551.06 |

vs. Samuel Goldwyn

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Respondent's Exhibit C—(Cont'd)

Page 3 of Return

SCHEDULE L—Reconciliation of Net Income and Analysis
of Changes in Surplus

| | | |
|---------|---|--------------|
| 1. | Net income from Item 24, page 1 of the return.... | \$ 28,475.54 |
| 2. | Nontaxable income: | |
| | (f) Other items of nontaxable income(to be detailed) : | |
| | (1) Profit from exchange of assets in kind | |
| | (2) Mimeograph | 30.00 |
| | (3) Check Protector | 45.00 |
| * * * * | | |
| 5. | Total of Lines 1 to 4, inclusive..... | \$ 28,400.54 |
| 6. | Total from Line 14..... | 3,032.53 |
| <hr/> | | |
| 7. | Net profit for year, as shown by books, before any adjustments are made therein (Line 5 minus Line 6) | \$ 31,433.07 |
| 8. | Surplus and undivided profits as shown by bal- ance sheet at close of preceding taxable year.... | 38,729.35 |
| 9. | Other credits to surplus (to be detailed) : | |
| | (a) Cancellation of portion of dividend declared | 1,565.67 |
| <hr/> | | |
| 10. | Total of Lines 7 to 9, inclusive..... | \$ 68,596.75 |
| * * * * | | |
| 12. | Surplus and undivided profits as shown by bal- ance sheet at close of taxable year (Line 10 minus Line 11) | \$ 68,596.75 |
| 13. | Unallowable deductions: | |
| | (b) Income and profits taxes paid to the United States, and so much of such taxes paid to its possessions or foreign countries as are claim- ed as a credit in Item 32, page 1 of the return | 3,032.53 |
| <hr/> | | |
| 14. | Total of Line 13..... | \$ 3,032.53 |

QUESTIONS

KIND OF BUSINESS

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the busi-

Respondent's Exhibit C—(Cont'd)

ness sufficient to give the information called for under each general class.

* * * I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons. * * *

3. Answers: (a) General class (use key letter designation): "I": Designing and constructing motion picture sets of common building materials. Providing labor, space, services, facilities and equipment for production of motion pictures.

AFFILIATIONS WITH OTHER CORPORATIONS

(See Instructon 38)

4. Is this a consolidated return of two or more corporations? No.

5. Did the corporation file a consolidated return for the preceding taxable year? No.

PREDECESSOR BUSINESS

6. Did the corporation file a return under the same name for the preceding taxable year? Yes. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? Yes. If answer is "yes," give name and address of each predecessor business, and the date of the change in entity: Pickford-Fairbanks Studios Company, November 22, 1926. United Artists Studio Corp., February 16, 1931.

BASIS OF RETURN

7. Is this return made on the basis of actual receipts and disbursements? Yes.

VALUATION OF INVENTORIES

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock: Cost or market, whichever is lower.

LIST OF ATTACHED SCHEDULES

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The

Respondent's Exhibit C—(Cont'd)

name and address of the corporation should be placed on each separate schedule accompanying the return.

Schedule "A"—Cost of Manufacturing or Producing Goods

Schedule "D"—Repairs and Maintenance

Schedule "G"—Bad Debts

Schedule "I"—Depreciation

Schedule "X"—Operating Expenses

The corporation's books are in care of M. A. Ezzell, Auditor. Located at 1041 No. Formosa Avenue, Los Angeles, California.

Page 4 of Return

SCHEDULE A—Cost of Manufacturing or Producing Goods
(See Instruction 2)

See separate schedule

SCHEDULE B—Profit from Sale of Real Estate, Stocks,
Bonds, Etc. (See Instruction 8)

| 1. Kind of Property | 2. Date Acquired | 3. Amount Realized |
|------------------------|------------------|--------------------|
| Framed Picture | 1931 | \$15.00 |
| Camera Motor Case..... | 1927 | 10.00 |

Schedule B—(Continued)

| 4. Depreciation Allowable Since Acquisition | 5. Cost or Value as of Mar. 1, 1913, Whichever Greater | 7. Net Profit (Enter as Item 8) |
|---|--|------------------------------------|
| \$ 3.50 | \$35.00 | \$16.50 |
| 15.00 | 15.00 | 10.00 |
| | | 6.50 |

SCHEDULE C—Compensation of Officers (See Instruction 12)

1. Name of Officer: A. M. Brentinger. 2. Official Title: Vice President. 3. Time Devoted to Business: $\frac{3}{4}$. 6. Amount of Compensation (Enter as Item 12): \$15,900.00.

SCHEDULE D—Cost of Repairs (See Instruction 14)

See separate schedule

Respondent's Exhibit C—(Cont'd)

SCHEDULE E—Taxes Paid (See Instruction 16)

| 1. Items | 2. Amount (Enter as Item 16) |
|--|---------------------------------|
| Los Angeles—City and County..... | \$ 28,207.58 |
| State of California—Franchise | 25.00 |
| State of California—Auto Licenses..... | 246.50 |
| Federal Bank Check Tax..... | 10.44 |
| | <hr/> |
| | \$28,489.52 |

* * * *

SCHEDULE G—Bad Debts (See Instruction 18)

See separate schedule

* * * *

SCHEDULE I—Explanation of Deduction for Depreciation
(See Instruction 20)

See separate schedule

AFFIDAVIT

I, the undersigned, treasurer of the corporation for which this return is made, being duly sworn, depose and say that this return, including the accompanying schedules and statements, has been examined by me and is, to the best of my knowledge and belief, a true and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1928 of 1928 and the Regulations issued thereunder.

(Corporate Seal)

/s/ A. M. BRENTINGER,

For President.

/s/ A. M. BRENTINGER,

Treasurer.

Sworn to and subscribed before me this 13th day of September, 1932.

(Seal)

/s/ A. R. [Illegible]

(Signature of Officer administering oath)

The President of the corporation being absent from the city, Mr. A. M. Brentinger, who is Vice-President and Treasurer, has signed as Treasurer and also for the President.

[Endorsed]: T.C.U.S. Admitted in evidence Nov. 4, 1946. [202]

Respondent's Exhibit D—(Cont'd)

Page 2 of Return

SCHEDULE K—BALANCE SHEETS (See Instruction 47)

| Items | Beginning of Taxable Year | | End of Taxable Year | |
|---------------------------------|---------------------------|--------------|---------------------|-------------|
| | Amount | Total | Amount | Total |
| ASSETS | | | | |
| 1. Cash..... | ..... | \$ 33,200.29 | ..... | \$ 7,090.78 |
| 2. Notes receivable..... | ..... | 200.00 | ..... | 245.00 |
| 3. Accounts receivable..... | \$ 178,796.59 | ..... | \$ 144,520.09 | ..... |
| Less reserve for bad debts..... | ..... | 178,796.59 | 3,097.77 | 141,422.32 |
| 4. Inventories: | | | | |
| Work in process..... | \$ 81.18 | ..... | ..... | ..... |
| Supplies..... | 47,831.70 | ..... | \$ 39,754.37 | ..... |
|  | ..... | 47,912.88 | ..... | 39,754.37 |
| 7. Deferred Charges: | | | | |
| Prepaid insurance..... | \$ 21,109.04 | ..... | \$ 17,417.09 | ..... |
| Prepaid taxes..... | 304.50 | ..... | 295.50 | ..... |
| All other..... | 27,930.09 | 49,343.63 | 16,938.96 | 34,651.55 |

vs. Samuel Goldwyn

Respondent's Exhibit D—(Cont'd)

Schedule K—Balance Sheets—(Cont'd)

Page 2 of Return—(Cont'd)

| Items | Beginning of Taxable Year | | End of Taxable Year | |
|--|---------------------------|-----------------|---------------------|---------------|
| | Amount | Total | Amount | Total |
| ASSETS—(Cont'd) | | | | |
| 8. Capital assets: | | | | |
| Land (Leased) | | | | |
| Buildings and Leasehold Improvements..... | \$ 1,057,989.67 | | \$ 1,066,124.31 | |
| Machinery and equipment..... | 976,937.42 | | 987,927.01 | |
| Furniture and fixtures..... | 73,182.45 | | 76,735.34 | |
| Delivery equipment..... | 21,529.98 | | 21,694.98 | |
| | | | | |
| | \$ 2,129,639.52 | | \$ 2,152,481.64 | |
| Less reserves for depreciation (except on land) | 1,266,858.54 | 862,780.98 | 1,526,708.68 | 625,772.96 |
| 11. Other assets (describe fully): | | | | |
| Deposit to be applied on purchase of land if option to purchase is exercised..... | \$ 43,718.74 | 43,718.74 | | |
| 12. Total Assets..... | | \$ 1,215,953.11 | | \$ 848,936.98 |

Respondent's Exhibit D—(Cont'd)

Schedule K—Balance Sheets—(Cont'd)

Page 2 of Return—(Cont'd)

| | Beginning of Taxable Year | | End of Taxable Year | |
|---|---------------------------|-----------------|---------------------|---------------|
| | Amount | Total | Amount | Total |
| LIABILITIES | | | | |
| 13. Notes payable (less than one year)..... | ..... | \$ 40,000.00 | ..... | ..... |
| 14. Accounts payable..... | ..... | 74,025.53 | ..... | \$ 53,744.06 |
| 17. Accrued expenses: | \$ 333.33 | ..... | ..... | ..... |
| Interest..... | ..... | ..... | ..... | ..... |
| Taxes..... | ..... | 333.33 | \$ 967.10 | ..... |
| All other..... | ..... | ..... | ..... | 967.10 |
| 18. Other liabilities (describe fully): | \$ 203,091.00 | 203,091.00 | ..... | ..... |
| Dividends Payable..... | ..... | ..... | ..... | ..... |
| 19. Capital stock: | | | | |
| Common stock (less stock in treasury)..... | \$ 967,100.00 | 967,100.00 | \$ 967,100.00 | 967,100.00 |
| 20. Surplus..... | \$ 68,596.75 | ..... | \$ 172,874.18 | ..... |
| 21. Undivided profits..... | ..... | 68,596.75 | ..... | 172,874.18 |
| 22. Total Liabilities..... | ..... | \$ 1,215,953.11 | ..... | \$ 848,936.98 |

Respondent's Exhibit D—(Cont'd)

Page 3 of Return

SCHEDULE L—Reconciliation of Net Income and Analysis of
Changes in Surplus

| | | |
|---------|--|--------------|
| 1. | Net income from Item 26, page 1 of the return.... | \$101,349.36 |
| (f) | Other items of nontaxable income (to be detailed): | |
| | (1) Profit from exchange of assets in kind.... | 169.70 |
| * * * * | | |
| 5. | Total of Lines 1 to 4, inclusive..... | \$101,179.66 |
| 6. | Total from Line 14..... | 3,097.77 |
| | | |
| 7. | Net profit for year, as shown by books, before any adjustments are made therein (Line 5 minus Line 6) | \$104,277.43 |
| 8. | Surplus and undivided profits as shown by bal- ance sheet at close of preceding taxable year..... | 68,596.75 |
| * * * * | | |
| 10. | Total of Lines 7 to 9, inclusive..... | \$172,874.18 |
| * * * * | | |
| 12. | Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11) | \$172,874.18 |
| 13. | Unallowable deductions: | |
| | (i) Additions to reserve for bad debts which are not included in Item 20, page 1 of return.... | 3,097.77 |
| | | |
| 14. | Total of Line 13..... | \$ 3,097.77 |
| * * * * | | |

NET INCOME (OR DEFICIT) REPORTED IN RETURN
FOR 1932 BEFORE DEDUCTING NET LOSS
FOR PRIOR YEAR

| | | |
|----|---|--------------|
| 1. | Enter amount of net income (or deficit) for 1932 before deducting net loss for prior year..... | \$ 28,475.54 |
| 2. | Enter amount deducted in return for 1932 as net loss for prior year..... | \$ 0.00 |

KIND OF BUSINESS

3. State the main business engaged in, also whether acting as principal or as agent on commission; state if inactive or in liquidation: Designing and constructing motion picture sets of common building materials. Providing labor, space, services, facilities and equipment for production of motion pictures.

Respondent's Exhibit D—(Cont'd)

Check the proper block below to indicate the general industrial division in which the corporation's main income-producing business falls:

Manufacturing— [x] Other manufacturing.

x

[x] Service—professional, business, amusement, and domestic, including hotels, restaurants, laundries, etc.

AFFILIATIONS WITH OTHER CORPORATIONS

See Instruction 42

4. Is this a consolidated return of two or more corporations? No.

5. Was the income of this corporation included in a consolidated return for the prior year? No.

PREDECESSOR BUSINESS

6. Did the corporation file a return under the same name for the preceding taxable year? Yes. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? Yes. If answer is "yes," give name and address of each predecessor business, and the date of the change in entity: Pickford-Fairbanks Studios Co., November 22, 1926; United Artists Studio Corp., February 16, 1931.

BASIS OF RETURN

7. Is this return made on the basis of actual receipts and disbursements? Yes.

VALUATION OF INVENTORIES

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock: Cost or market, whichever is lower.

LIST OF ATTACHED SCHEDULES

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return.

Schedule "A"—Miscellaneous Costs

Schedule "D"—Repairs and Maintenance

Schedule "G"—Bad Debts

Schedule "I"—Depreciation

Schedule "X"—Operating Expenses

Respondent's Exhibit D—(Cont'd)

Page 4 of Return

SCHEDULE A (See Instructions 2 and 5)

See separate schedule

* * * *

SCHEDULE C—COMPENSATION OF OFFICERS

(See Instruction 14)

1. Name of Officer: A. M. Brentinger. 2. Official Title: Vice President. 3. Time Devoted to Business: $\frac{3}{4}$. 6. Amount of Compensation (Enter as Item 14): \$13,900.00.

SCHEDULE D—Cost of Repairs (See Instruction 16)

See separate schedule

SCHEDULE E—Taxes Paid (See Instruction 18)

| 1. Items | 2. Amount (Enter as Item 18) |
|--|---------------------------------|
| Los Angeles—City and County..... | \$ 23,093.72 |
| State of California—Franchise..... | 25.00 |
| State of California—Auto Licenses..... | 203.00 |
| Federal Bank Check Tax..... | 336.28 |
| Federal Capital Stock Tax..... | 967.10 |

* * * *

\$ 24,625.10

SCHEDULE G—Bad Debts (See Instruction 20)

See separate schedule

* * * *

SCHEDULE I—Explanation of Deduction for Depreciation

(See Instruction 22)

See separate schedule

The Assistant Treasurer being absent from the City, Mr. R. P. Fairbanks, who is President, has signed as President and also for the Assistant Treasurer. The office of Treasurer is vacant at the present time.

AFFIDAVIT

I, the undersigned, president of the corporation for which this return is made, being duly sworn, depose and say that this return, including the accompanying schedules and statements, has been examined by me and is, to the best of my knowledge and

Respondent's Exhibit D—(Cont'd)

belief, a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1932 and the Regulations issued thereunder.

(Corporate Seal)

/s/ R. P. FAIRBANKS,
President.

/s/ R. P. FAIRBANKS,
For the Asst. Treasurer.

Sworn to and subscribed before me this 12th day of September, 1933.

(Seal) /s/ MAYBELLE STREETER,
(Signature of officer administering oath)

[Endorsed]: T.C.U.S. Admitted in evidence Nov. 4, 1946. [206]

RESPONDENT'S EXHIBIT E

Douglas Fairbanks (Company)

Balances at Dates Indicated Owing to United
Artists Studio Corp.

| | | | |
|----|---------------------|---------|------------|
| A. | Jan. 7, 1931 | (N. P.) | \$1,008.38 |
| B. | Jan. 16, 1932 | | 3,529.91 |
| C. | Dec. 31, 1932 | | 4,202.90 |
| D. | Jan. 7, 1933 | | 4,400.27 |
| E. | Nov. 25, 1933 | | 108.24 |

[Endorsed]: T.C.U.S. Admitted in evidence Nov. 7, 1946.

RESPONDENT'S EXHIBIT F

Mary Pickford (Company)

Balances at Dates Indicated Owing to United
Artists Studio Corp.

A. Jan. 7, 1931

Title of Account

| | |
|---------------|-----------|
| 91 - 25 | \$ 108.29 |
| N. P. | 1,327.88 |

| | |
|-------------------------|----------|
| Total—Jan. 7, 1931..... | 1,436.17 |
|-------------------------|----------|

| | |
|------------------------|--------|
| B. Jan. 16, 1932 | 577.37 |
|------------------------|--------|

| | |
|------------------------|-----------|
| C. Dec. 31, 1932 | 40,471.00 |
|------------------------|-----------|

| | |
|-----------------------|-----------|
| D. Jan. 7, 1933 | 13,648.35 |
|-----------------------|-----------|

| | |
|-----------------------|--------|
| E. Oct. 7, 1933 | 155.73 |
|-----------------------|--------|

[Endorsed]: T.C.U.S. Admitted in evidence Nov.
7, 1946.

RESPONDENT'S EXHIBIT G

Samuel Goldwyn Inc., Ltd.

Balances at Dates Indicated Owing to United
Artists Studio Corp.

A. Jan. 7, 1931

Title of Account

| | |
|--------------------------|-------------|
| The Prodigal | \$ 1,766.37 |
| Whoopee | 114.47 |
| One Heavenly Night | 466.50 |
| N. P. | 3,056.96 |

Total—Jan. 7, 1931.....\$ 5,404.30

B. Jan. 16, 1932\$ 94,088.69

C. Dec. 31, 1932 83,625.66

D. Jan. 7, 1933 103,844.53

E. June 24, 1933 53,802.23

[Endorsed]: T.C.U.S. Admitted in evidence Nov.
7, 1946.

RESPONDENT'S EXHIBIT H

Feature Productions Inc.

Balance at Dates Indicated Owing to United
Artists Studio Corp.

A. Jan. 7, 1931

Title of Account

| | |
|----------------------------|-------------|
| N. P. | \$ 6,118.21 |
| Kiki | 5,579.86 |
| Bride 66 | 120.79 |
| Reaching for the Moon..... | 19,459.31 |
| Abraham Lincoln | 26.29 |
| Madame Du Barry | 102.65 |
| The Bat Whispers | 1,483.70 |
| Indiscreet | 7,054.91 |
| Corsair | 93.85 |

Total—Jan. 7, 1931.....\$ 40,039.57

| | |
|------------------------|--------------|
| B. Jan. 16, 1932 | \$129,792.36 |
| C. Dec. 31, 1932 | 237,456.46 |
| D. Jan. 7, 1933 | 238,064.04 |
| E. Dec. 30, 1933 | 49.14 |

[Endorsed]: T.C.U.S. Admitted in evidence Nov.
7, 1946.

DATE
SAT 09

NAME

Major Palmer

708121

| | | | |
|---------|-----|---------|---------|
| L 11275 | 859 | 270 | 100 100 |
| L 11276 | | 2671 | 100 100 |
| L 11277 | | 2570 | 100 100 |
| G 11280 | | 100 100 | |
| G 11291 | | 100 100 | |
| T 11307 | | 100 100 | |
| M 11309 | | 3843 | 100 100 |
| G 11310 | | 100 100 | |
| L 11316 | 860 | 3018 | 100 100 |
| L 11317 | | 2000 | 100 100 |
| L 11319 | | 4038 | 100 100 |
| L 11320 | | 250 | 100 100 |
| S 11321 | | 100 100 | |
| G 11323 | | 600 | 100 100 |
| T 11325 | | 6962 | 100 100 |
| M 11328 | | 966 | 100 100 |
| M 11332 | | 229 | 100 100 |
| M 11333 | | 205.2 | 100 100 |
| M 11334 | | 100 100 | |
| M 11335 | | 100 100 | |

Amundson

8897
861

305,907

2400000
8152997
5952997

| | | | |
|---------|--|---------|---------|
| S 11340 | | 100 100 | |
| S 11341 | | 100 100 | |
| L 11346 | | 1899 | 100 100 |
| L 11347 | | 2746 | 100 100 |
| 11348 | | 1203 | 100 100 |
| 11349 | | 2822 | 100 100 |
| 11350 | | 2762 | 100 100 |
| 11351 | | 100 100 | |
| 11352 | | 794 | 100 100 |
| S 11359 | | 100 100 | |
| T 11361 | | 62 | 100 100 |
| T 11363 | | 737 | 100 100 |
| G 11365 | | 100 100 | |
| G 11377 | | 100 100 | |

| | CHARGES | CREDITS | |
|------------|---------|---------|--|
| L-11385 | 66 | 2468 | |
| L-11386 | | 60 | |
| L-11387 | | 911 | |
| L-11388 | | 1253 | |
| T-11392 | | 2088 | |
| T-11393 | | 438 | |
| G-11398 | | 4280 | |
| M-11399 | | 156 | |
| M-11401 | | 1126 | |
| M-11410 | | 924 | |
| L-11412 | | 513 | |
| L-11413 | | 4108 | |
| L-11414 | | 513 | |
| G-11418 | | 908 | |
| 10 T-11422 | 864 | 250 | |
| T-11423 | | 156 | |
| L-11426 | | 1027 | |
| T-11429 | | 250 | |
| T-11430 | | 250 | |
| L-11431 | | 1140 | |
| L-11432 | | 696 | |
| L-11433 | | 316 | |
| L-11434 | | 3430 | |
| L-11435 | | 4077 | |
| T-11441 | | 500 | |
| T-11446 | | 563 | |
| T-11447 | | 825 | |
| M-11450 | | 405 | |
| T-11452 | | 125 | |
| G-11454 | | 3220 | |
| L-11474 | 865 | 277 | |
| L-11475 | | 620 | |
| L-11476 | | 7512 | |
| L-11477 | | 8258 | |
| E-11480 | | 3321 | |
| | | 6072677 | |

THE TAX COMMISSION
NOV 7 1945
EXHIBIT - V

| | | | | |
|------------------|------|-------|-----|--------|
| 2 11097 | 250 | 150 | 100 | |
| 2 11062 | 250 | 150 | 100 | |
| 2 11073 | 250 | 150 | 100 | |
| 2 11107 | 250 | 150 | 100 | |
| 2 11120 | 250 | 150 | 100 | |
| 2 11104 | 250 | 150 | 100 | |
| 2 11187 | 250 | 150 | 100 | |
| 2 11124 | 250 | 150 | 100 | |
| 2 11287 | 857 | 150 | 100 | 35964 |
| 2 11250 | 250 | 150 | 100 | |
| 2 11273 | 85 | 150 | 100 | 64516 |
| 2 11278 | 250 | 150 | 100 | |
| 2 11281 | 250 | 150 | 100 | |
| 2 11296 | 250 | 150 | 100 | |
| 2 11305 | 250 | 150 | 100 | |
| 2 11318 | 250 | 150 | 100 | |
| <i>Dividends</i> | 860 | 150 | 100 | |
| 3 11366 | 8897 | 6597 | 100 | 664987 |
| 3 11381 | 861 | 6597 | 100 | |
| 3 11401 | 862 | 6597 | 100 | |
| 10 11436 | 864 | 11436 | 100 | |
| A 11456 | | 100 | 100 | |
| A 11486 | | 100 | 100 | |
| M 11494 | | 100 | 100 | |
| A 11506 | | 100 | 100 | |
| 17 A-11570 | 868 | 6597 | 100 | 18663 |
| A-11584 | | 100 | 100 | |
| M-11622 | 870 | 5970 | 100 | |
| 11 11686 | 872 | 362 | 100 | 24955 |
| 11 11699 | | 100 | 100 | |
| 11 11715 | | 100 | 100 | |
| 11 11729 | 873 | 100 | 100 | |
| 11 11739 | | 100 | 100 | |
| 11 11747 | | 100 | 100 | |

SHEET
NOCREDIT
RATING

STANDARD FORM NO. 62 PRINTED IN U.S.A.

DATE
1953CREDIT
LIMITNAME *Mary J. [illegible]*

ADDRESS

SEC. U.S. PAY. OFF. STANDARD BALANCE SHEET

| DATE | DESCRIPTION | POSTING REFERENCE | CHARGES | | CREDITS | | BALANCE | | REMARKS |
|------|-------------|----------------------|---------|--|---------|-----|---------|--|---------|
| 2/11 | | | | | | | | | |
| | 310547 | 836 | 1450 | | | | | | |
| | L 10600 | | 3189 | | | | | | |
| | 2 10603 | | 10800 | | | | | | |
| | L 10610 | | 407 | | | | | | |
| | S 10612 | | 1525 | | | | | | |
| | L 10611 | | 3970 | | | | | | |
| | U 10633 | 838 | 591 | | | | 83126 | | |
| | 281 10627 | 839 | 532 | | | | | | |
| | L 10642 | | 742 | | | | | | |
| | Q 10650 | | 315 | | | 300 | | | |
| | L 10662 | | 570 | | | | | | |
| | U 10673 | | 731 | | | | | | |
| | L 10679 | 840 | 253 | | | | | | |
| | L 10686 | | 63 | | | | | | |
| | L 10688 | | 174 | | | | | | |
| | L 10680 | | 1540 | | | | | | |
| | Q 10716 | 841 | 8420 | | | | 85141 | | |
| | 2 L 10722 | 842 | 443 | | | | | | |
| | L 10725 | | 506 | | | | | | |
| | L 10730 | | 468 | | | | | | |
| | 17 10738 | | 35 | | | | | | |
| | 17 10753 | | 6984 | | | | | | |
| | L 10758 | | 189 | | | | | | |
| | L 10764 | 843 | 127 | | | | 86163 | | |
| | L 10791 | 844 | 30 | | | | | | |
| | L 10800 | | 6547 | | | | | | |
| | 3 10830 | 845 | 915 | | | | 867705 | | |
| | 1 Contra | 846 | 3375 | | | | 864330 | | |
| | 4-8 m 10850 | | 337 | | | | | | |
| | L 10870 | | 80 | | | | | | |
| | L 10889 | 847 | 6597 | | | | | | |
| | m 10908 | | 685 | | | | 872029 | | |
| | L 10911 | 848 | 33 | | | | | | |
| | Q 10915 | 849 | 6597 | | | | 878661 | | |
| | L 10918 | 350 | 676 | | | | 878731 | | |



SHEET NO.

CREDIT RATING

CREDIT LIMIT

NAME

Nature Production Co. Ltd.

ADDRESS

STANDARD FORM NO. 646-10-1-1

REG. U.S. PAT. OFF. STANDARD BALANCE SHEET

| DATE | DESCRIPTION | POSTED REFERENCE | CHARGES | CREDITS | BALANCE | REMARKS |
|------|-------------|------------------|---------|---------|---------|---------|
| 7-1 | 19927 | 819 | 642 | | | |
| | 19933 | | 506 | | | |
| | 19953 | | 751 | | | |
| | 19972 | 820 | 141 | | | |
| | 19982 | | 2794 | | | |
| | 19993 | | 1828 | | | |
| | 210022 | 821 | 994 | | | |
| | A10041 | | 9030 | | | |
| | A10048 | | 1063 | | | |
| | A10052 | 822 | 20 | | | |
| 11 | 210062 | 823 | 222 | | | |
| | 210066 | | 715 | | | |
| | 210071 | | 4798 | | | |
| | 210078 | | 750 | | | |
| | 210085 | | 450 | | | |
| | 210095 | | 125 | | | |
| | A10102 | 824 | 20 | | | |
| | A10103 | 825 | 2759 | | | |
| | A10160 | | 1063 | | | |
| | A10170 | | 8001 | | | |
| | P10172 | | 750 | | | |
| 18 | 210271 | 829 | 22798 | | | |
| | A10291 | 828 | 6288 | | | |
| | A10292 | | 1063 | | | |
| | A10290 | | 7201 | | | |
| | A10294 | | 2851 | | | |
| | A10301 | 829 | 522 | | | |
| | A10302 | | 1001 | | | |
| | A10309 | | 2282 | | | |
| | A10310 | | 2687 | | | |
| | A10316 | | 1434 | | | |
| | A10317 | | 1741 | | | |
| NS | P10341 | 830 | 250 | | | |
| | A10343 | | 237 | | | |
| | 210376 | 831 | 1063 | | | |

IN COURT OF THE U.S.
 DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
 NOV 7 1948
 DEPENDENTS

| NAME | ADDRESS | DATE | AMOUNT | BALANCE |
|-------------|-------------|--------|--------|---------|
| <i>John</i> | <i>John</i> | | | |
| Q 11218 | | | | |
| Q 11225 | | | | |
| Q 11241 | | | | |
| L 11262 | 558 | 221 | | |
| 27 L 11272 | 559 | 55502 | | |
| Q 11282 | | 10 | | |
| Q 11292 | | 1245 | | |
| T 11206 | | 472 | | |
| L 11305 | | | | |
| L 11322 | | 122 | | |
| M 11329 | | 20 | | |
| <i>John</i> | <i>John</i> | | | |
| Q 11367 | 861 | 4230 | | |
| Q 11382 | 862 | 2000 | | |
| M 11409 | | 110 | | |
| Q 11420 | 863 | 1200 | | |
| 10 Q 11455 | 864 | 7250 | | |
| Q 11484 | 865 | 730 | | |
| Q 11491 | | 900 | | |
| M 11495 | | 2875 | | |
| Q 11507 | | 94 | | |
| 7 A 11569 | 866 | 4730 | | |
| A 11583 | 868 | 16367 | | |
| A 11597 | | 575 | | |
| M 11641 | | 4730 | | |
| Q 11678 | 870 | 1100 | | |
| R 11716 | 871 | 79 | | |
| A 11728 | 872 | 2250 | | |
| A 11735 | 873 | 190 | | |
| A 11765 | | 289 | | |
| M 11774 | | 4230 | | |
| 71 T 11795 | 874 | 800 | | |
| A 11823 | 875 | 100 | | |
| M 11830 | | 163 | | |
| | | 191 | | |
| | | 60 | | |
| | 876 | 169 | | |
| | 8926 | 569503 | | |
| | | 601902 | | |

NAME

Douglas Fairbanks Co

SHEET
NO

ADDRESS

CREDIT
RATINGCREDIT
LIMIT

STANDARD FORM 66 PRINTED IN U.S.A.

DATE 10-33 POSTING REFERENCE CHARGES Y CREDITS Y BALANCE Y REMARKS

| | | | | | | | | |
|----|---------|-----|--------|--|-----------|--|-------|--|
| | | | 601938 | | | | | |
| 71 | A 11873 | 877 | 4230 | | 19 30 | | | |
| | A 121 | 878 | 400 | | 9 20 | | | |
| | A 1503 | 879 | 8405 | | 130 19 30 | | | |
| | Cash | 189 | | | 601769 | | 13402 | |
| 78 | A 739 | 881 | 4230 | | 9 20 | | | |
| | A 256 | 882 | 300 | | 19 30 | | | |
| | M 769 | | 170 | | 9 20 | | | |
| 15 | A 401 | 885 | 4230 | | 601769 | | 17852 | |
| | A 626 | 886 | 1700 | | AUG 19 30 | | | |
| | A 654 | 887 | 865 | | AUG 19 30 | | | |
| | A 559 | 890 | 495 | | AUG 19 30 | | | |
| | A 578 | | 4230 | | AUG 19 30 | | | |
| | A 596 | 891 | 600 | | | | | |
| | A 610 | | 420 | | 19 30 | | | |
| 79 | T 713 | 894 | 300 | | | | 30392 | |
| | A 722 | | 420 | | | | | |
| | A 761 | 895 | 700 | | AUG 19 30 | | | |
| | M 813 | 897 | 360 | | AUG 19 30 | | | |
| | N 820 | | 11245 | | AUG 19 30 | | | |
| 85 | A 926 | 900 | 4230 | | AUG 19 30 | | | |
| | M 998 | 902 | 90 | | AUG 19 30 | | | |
| | A 1017 | | 1450 | | AUG 19 30 | | | |
| 12 | A 1154 | 906 | 4230 | | AUG 19 30 | | | |
| | A 1256 | 909 | 50 | | AUG 19 30 | | | |
| | A 1270 | | 800 | | AUG 19 30 | | | |
| | M 1299 | 910 | 421 | | AUG 19 30 | | | |
| 19 | A 1427 | 914 | 1125 | | | | | |
| | M 1482 | 915 | 225 | | | | | |
| | A-1514 | 916 | 4230 | | | | | |
| | B-1522 | | 450 | | | | | |
| | A-1543 | 917 | 1200 | | | | | |
| 19 | Cash | 190 | | | 57215 | | | |
| | | 196 | | | 1208 | | 7332 | |
| | A-1721 | 922 | 85 | | | | | |
| | A-1739 | 923 | 850 | | | | | |

MM2

In the United States Circuit Court of Appeals
For the Ninth Circuit

T. C. Docket No. 8770

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

SAMUEL GOLDWYN,

Respondent on Review.

PETITION FOR REVIEW

The Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on November 17, 1947, ordering and deciding that there is no deficiency in income and victory tax for the calendar year 1943. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the United States Internal Revenue Code.

I.

JURISDICTION

Samuel Goldwyn, respondent on review, is an individual residing at 1200 Laurel Drive, Beverly Hills, California, and filed his United States individual income tax return for the calendar year 1942 and his United States individual income and victory tax return for the year 1943 with the Col-

lector of Internal Revenue for the Sixth District of California, located at Los Angeles, California, which collection district is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, wherein this review is sought.

II.

NATURE OF CONTROVERSY

The question to be presented to this Court for review is: Did the declaration of a cash dividend on September 11, 1930, payable as of December 15, 1930, followed only by the entry on books of the declaring corporation charging surplus and crediting dividends payable accounts, constitute a "distribution" within the meaning of Section 115 (a) of the Internal Revenue Code so as to reduce earnings and profits in the fiscal year ended June 30, 1931 (as contended by taxpayer and held by the Tax Court); or did the distribution and reduction occur in May 1933, when the dividend was credited to the respective shareholders' indebtedness to the corporation (as contended by the Commissioner) whereby, if the former, a distribution made in 1942 to the taxpayer, sole shareholder, is taxable only to the extent of \$104,610.56 and, if the latter, to the extent of \$239,059.58?

In deciding the above question adversely to the Government, five judges dissented, and Judge Disney wrote a dissenting opinion, which the Commissioner contends is in accord with the revenue laws and judicial opinion. The holding of the majority that, although the word "distribution" of a

dividend means payment in determining the time of taxability of the dividend to the shareholder, the word "distribution" means declaration and not payment in determining the source of the distribution to the shareholder presents an anomalous situation and is an unjustified limitation of the principles established in *Mason v. Routzahn* (1927) 275 U. S. 175. It is therefore submitted that "distribution" means a [220] "division or proportionment among several or many" and until earnings and profits of a corporation are actually distributed they remain as such available for future distributions and that the entries made on the corporation's books charging surplus and crediting dividends payable account did not per se make the declared dividends available to the shareholders and accordingly does not constitute payment, actually or constructively within the meaning of the Statute.

III.

ASSIGNMENT OF ERRORS

The errors committed by the Tax Court, which are relied upon by the Commissioner as the basis of this petition for review, are as follows:

That the Tax Court of the United States erred:

1. In holding and deciding that the corporation's surplus was reduced in the amount of \$203,091.00 in the fiscal year 1931 by virtue of the declaration of a dividend on September 11, 1930, payable December 15, 1930.

2. In holding and deciding, in the alternate, that the crediting and control, exercised by the share-

holders over the dividend in the fiscal year ended June 30, 1931, effected a distribution in the fiscal year 1931, and accordingly reduced surplus in the same year by the amount of \$203,091.00.

3. In holding and deciding that the shareholder had complete control from December 15, 1930 of the dividend declared September 11, 1930 and that the shareholders constructively received the dividend as of such date. [221]

4. In holding and concluding that of the dividend of \$800,000.00 received by the taxpayer in 1942 (taxable in 1943) only \$104,610.56 constituted a distribution of earnings and profits subject to tax.

5. In failing to hold and decide that the date of payment or distribution to the shareholders fixed the year in which the surplus was decreased.

6. In failing to hold and decide that the declared dividend was not paid or distributed until the fiscal year 1933 when the respective shareholders' accounts were credited with their proportionate part.

7. In failing to hold and decide that the shareholders did not have control actually or constructively of the dividend declared September 11, 1930 until it was unqualifiedly credited to their respective accounts in May 1933.

8. In failing to hold and conclude that of the dividend of \$800,000.00 received by the taxpayer in 1942 (taxable in 1943) the sum of \$239,059.58 constituted a distribution of earnings and profit subject to tax.

9. In that its opinion and decision are contrary

to the law and the regulations and judicial decision and are not supported by the evidence of record.

10. In ordering and deciding that there is no deficiency in income and victory tax for the calendar year 1943.

11. In failing to order and decide that there is a deficiency [222] in income and victory tax for the calendar year 1943 in the amount of \$117,688.82.

Wherefore, the petitioner on review petitions that the decision of The Tax Court of the United States entered herein be reviewed by this Honorable Court and appropriate action be taken to correct the errors herein complained of.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue, Attorneys
for Petitioner on Review.

Of Counsel:

CLAUDE R. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Feb. 4, 1948. [223]

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Ferdinand Tannenbaum, Esq., Z. N. Diamond,
Esq., 20 Exchange Place, New York, New York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 4th day of February, 1948, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 4th day of February, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue, Counsel
for Petitioner on Review.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed Feb. 10, 1948. [224]

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Samuel Goldwyn, 1200 Laurel Drive, Beverly
Hills, California:

You are hereby notified that the Commissioner of Internal Revenue did, on the 4th day of February, 1948, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 4th day of February, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue, Counsel
for Petitioner on Review.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed Feb. 17, 1948. [225]

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN RECORD ON REVIEW.

To the Clerk of the Tax Court of the United
States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled proceedings, in connection with the petition for review by said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue.

1. Docket entries in this proceeding.

2. Pleadings.

(a) Petition, including annexed copy of deficiency notice and statement attached hereto.

(b) Answer.

(c) Amended petition.

(d) Answer to amended petition.

3. Findings of Fact and Opinion.

4. Decision. [226]

5. Official Report of Proceedings before the Tax Court of the United States at New York, New York, November 4 to 7, 1946 containing 113 pages, including "contents" and covers.

6. Stipulation of Facts with all exhibits attached (Joint Exhibit 1-A, 2-B, 3-C).

7. Joint Exhibits 4-D, 5-E, 6-F; Petitioner's Ex-

hibits 1, 2, 3, 4, and Respondent's Exhibits A. B. C, D, E, F, G, H, I, J, K, L.

8. Petition for review, including Statement of Points to be relied upon, together with proof of service of notice of filing petition and statement of points and of service of a copy of petition for review and statement of points.

9. Orders of enlargement of time to file record on review.

10. This designation.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue, Counsel
for Petitioner on Review.

Notice of filing Designation of contents of record, proceedings and evidence to be contained in record on review, together with a copy of such designation, mailed the taxpayer's attorneys, Ferdinand Tannenbaum and Z. N. Diamond, Esquires, 20 Exchange Place, New York, New York, on the 23rd day of August, 1948.

[Endorsed]: T.C.U.S. Filed Aug. 23. 1948. [227]

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING DESIGNATION OF CON-
TENTS OF RECORD, PROCEEDINGS AND
EVIDENCE TO BE CONTAINED IN REC-
ORD ON REVIEW.

To: Ferdinand Tannenbaum, Esq., Z. N. Diamond,
Esq., 20 Exchange Place, New York, New York:

Please take notice that the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, has filed with the Clerk of the Tax Court of the United States on this date his Designation of contents of record, proceedings and evidence to be contained in record on review herein, a copy of which designation of record is delivered to you herewith.

Dated this 23rd day of August, 1948.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue, Counsel
for Petitioner on Review.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed Aug. 30, 1948. [228]

The Tax Court of the United States
Washington

Docket No. 8770

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

SAMUEL GOLDWYN,

Respondent.

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 228, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 9th day of September, 1948.

(Seal) /s/ VICTORS. MERSCH,
Clerk, The Tax Court of the United States.

In the United States Circuit Court of Appeals
for the Ninth Circuit

T. C. Docket No. 8770

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,
vs.

SAMUEL GOLDWYN,
Respondent on Review.

ORDER

For Cause Shown, It Is Ordered that the time within which to complete, transmit and file the transcript of record on review in the above-entitled cause to this Court, be and the same is extended to and including May 4, 1948.

And It Is Further Ordered that the Clerk of this Court transmit to the Clerk of The Tax Court of the United States a certified copy of this order.

FRANCIS A. GARRECHT,
U. S. Circuit Judge.

[Endorsed]: T.C.U.S. Filed Mar. 15, 1948.

[Endorsed]: Filed Mar. 8, 1948. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER

For Cause Shown, It Is Ordered that the time within which to complete, transmit and file the transcript of record on review in the above-entitled cause to this Court, be and the same is extended to and including June 18, 1948.

And It Is Further Ordered that the clerk of this Court transmit to the Clerk of The Tax Court of the United States a certified copy of this order.

FRANCIS A. GARRECHT,
U. S. Circuit Judge.

A true copy. Attest:

(Seal) /s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed April 20, 1948. Paul P. O'Brien, Clerk.

[Endorsed]: T.C.U.S. Filed April 26, 1948.

[Title of U. S. Court of Appeals and Cause.]

ORDER

For Cause Shown, It Is Ordered that the time within which to complete, transmit and file the transcript of record on review in the above-entitled

cause to this Court, be and the same is extended to and including September 16, 1948.

And It Is Further Ordered that the Clerk of this Court transmit to the Clerk of The Tax Court of the United States a certified copy of this order.

FRANCIS A. GARRECHT,
U. S. Circuit Judge.

A true copy. Attest: May 28, 1948.

(Seal) /s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed May 28, 1948. Paul P. O'Brien, Clerk.

[Endorsed]: T.C.U.S. Filed June 1, 1948.

[Endorsed]: No. 12037. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Samuel Goldwyn, Respondent. Transcript of Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed September 14, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12037

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

SAMUEL GOLDWYN,

Respondent.

NOTICE AS TO STATEMENT OF POINTS TO
BE RELIED UPON AND AS TO PARTS OF
RECORD TO BE PRINTED

Pursuant to Rule 19 of the United States Court of Appeals for the Ninth Circuit, notice is hereby given by the Commissioner of Internal Revenue, petitioner on review herein, as follows:

(1) As the statement of the points on which he intends to rely on the present review, the Commissioner hereby adopts the Statement of Points heretofore filed and served and included within the transcript of Record filed in this Court in this cause; and (2) the Commissioner hereby designates for printing the entire transcript of record filed in this Court in this cause.

Dated this 14th day of September, 1948.

/s/ THERON LAMAR CAUDLE,
Assistant Attorney General, Counsel for the Petitioner on Review.

[Endorsed]: Filed September 17, 1948. Paul P. O'Brien, Clerk.

No. 12037

In the United States Court of Appeals for the
Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAMUEL GOLDWYN, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
HARRY MARSELLI,
Special Assistants to the Attorney General.

FILED

JAN 10 1949

PAUL P. O'BRIEN,

CLERK

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**In the United States Court of Appeals for the
Ninth Circuit**

No. 12037

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAMUEL GOLDWYN, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE PETITIONER

OPINION BELOW

The findings of fact (R. 23-28) and the majority (R. 28-36) and dissenting (R. 36-46) opinions of the Tax Court are reported at 9 T. C. 510.

JURISDICTION

This petition for review (R. 205-209) involves a proceeding with respect to a deficiency in income tax for the year 1943 determined by the Commissioner against Samuel Goldwyn, the respondent on review (hereinafter referred to as "the taxpayer"), in the amount of \$117,688.82 (R. 8-14). The taxpayer is an individual residing in Beverly Hills, California, and filed his income tax returns for the years 1942 and 1943 with the Collector of Internal Revenue for

the Sixth District of California. (R. 23.) By letter dated June 29, 1945 (R. 8-14), the Commissioner of Internal Revenue notified the taxpayer that the determination of his income tax liability for the year 1943 disclosed a deficiency in the amount of \$117,688.82. Within ninety days thereafter, namely, on July 19, 1945 (R. 1), the taxpayer filed with the Tax Court a petition (R. 4-8) for a redetermination of the deficiency determined by the Commissioner as above stated, pursuant to Section 272 of the Internal Revenue Code. On November 17, 1947, the Tax Court entered its decision (R. 48), finding no deficiency for the year 1943. Less than three months thereafter, namely, on February 4, 1948, the Commissioner filed his petition (R. 205-209) for a review by this Court of the decision of the Tax Court, pursuant to the then applicable provisions of Sections 1141 and 1142 of the Internal Revenue Code, which have since been amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

The question in this case is as to what portion of a dividend received by the taxpayer in 1942 is taxable to him as a distribution of earnings and profits. That question turns upon whether a prior dividend, declared and payable in 1930, reduced earnings and profits of the corporation in that year (fiscal year ended June 30, 1931), or whether that dividend was not "distributed" and the earnings and profits were not reduced until the fiscal year ended in 1933, when it was actually paid.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend*.—The term “dividend” when used in this chapter (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

(b) *Source of Distributions*.—For the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. * * *

(26 U. S. C. 1946 ed., Sec. 115.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of dividend*.—The term “dividend” when used in this title (except in section 203 (a) (4) and section 208 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

(b) *Source of distributions*.—For the purposes of this Act every distribution is made

out of earnings or profits to the extent thereof,
and from the most recently accumulated earnings or profits. * * *

* * * * *

STATEMENT

The facts in this case were developed by a stipulation between the parties (R. 142-145), certain oral testimony (R. 65-126), and certain exhibits (R. 145-204) adduced in evidence before the Tax Court, as well as by some statements or stipulations of record by counsel for the parties at the trial (R. 128-141), from which the Tax Court in the course of the majority opinion (R. 22-36) made separate findings of fact (R. 23-28) which may be stated as follows:

The taxpayer for many years has been actively engaged in the motion picture industry, and on December 14, 1942, he became the owner of all of the capital stock of Samuel Goldwyn Studios, a California corporation, which was formerly known as United Artists Studio Corporation (the term "Studios" will be used hereinafter to refer to this corporation). (R. 23, 24.)

On November 30, 1942, by resolutions¹ of its board of directors, Studios had reduced the par value of its capital stock and had voted a distribution of \$800,000 to its shareholders out of surplus, which then amounted to \$870,390. Pursuant thereto, Studios distributed \$800,000 to the taxpayer on December 31, 1942 (R. 23-24) (and it may be pointed out at this point, the controversy in this case is as to what por-

¹ Copies of these resolutions are set out in Joint Exhibit 1-A (R. 145-148).

tion of that \$800,000 is taxable to the taxpayer as a dividend).

Studios had been organized in 1926 by Joseph M. Schenck, Mary Pickford and Douglas Fairbanks, and had acquired certain land in Hollywood, California, on which it erected buildings and other facilities for the production of motion pictures on a large scale, and it engaged in the rental of those facilities to producers of pictures, principally its own stockholders. In 1930 Studios was controlled by Feature Productions, Inc., which owned 66 percent of its outstanding shares and had agreed to purchase 23 percent more. All of Studios' stockholders were represented on its board of directors and took an active part in its affairs. They were billed weekly for the use of the facilities and for services and materials furnished, and made payment when Studios needed funds. A running account for each shareholder was maintained on the books, reflecting debit and credit entries. Studios and Feature Productions had the same manager, and the officers and directors of both were comprised largely of the same individuals. (R. 24.)

Studios maintained its accounts and filed its income tax returns on the accrual basis for a fiscal year ended June 30. At the end of its fiscal year ended June 30, 1930, Studios had accumulated earnings and profits (accumulated since February 28, 1913) in the amount of \$286,399.42, of which \$181,521.28 were earnings and profits for the fiscal year 1930. On September 11, 1930, its board of directors declared a "cash dividend" of \$21 per share to its shareholders of record as of September 10, 1930, payable on December 15, 1930,

the resolution² further authorizing and directing the treasurer of the corporation to give notice of and to pay the dividend when due. (R. 24-25.)

Pursuant to that resolution, an entry of the same date was made in the corporation's journal,³ debiting surplus with \$203,091,⁴ and crediting each of the twelve shareholders with his proportionate share of the amount declared as a dividend. The shareholders' portions of the amount of the dividend declared were likewise credited in the ledger to an account styled "Dividends Payable".⁵ The amounts so entered in the journal and in the "Dividends Payable" account of the ledger, however, were not credited in the shareholders' individual running accounts with the corporation, and hence the balances in the latter accounts did not reflect the dividend credits. (R. 25.)

² A copy of the minutes of the meeting of the board of directors at which the resolution was adopted (R. 143-144) is set forth in Joint Exhibit 2-B (R. 149-151).

³ The details of this entry appear in Exhibit 3-C (R. 152). While the Tax Court refers to the entry as being "of even date" (R. 25) with the resolution of September 11, 1930, the parties had stipulated (R. 144) that the entry was made on September 17, 1930, which is also the date of the corresponding credit entries in the "Dividends Payable" account (R. 156). In the reproduction of Exhibit 3-C in the printed record, the date of this journal entry appears erroneously as September 7, 1930. (R. 152.)

⁴ This is the correct amount of the total dividend declared. The original entry in the journal (Ex. 3-C, R. 152) was of an amount (\$204,656.67) which was greater by \$1,565.67 erroneously credited to Samuel Goldwyn, Inc., Ltd., but the error was later corrected by a reversing entry which eliminated the excess (R. 25; 91; also Joint Ex. 6-F, R. 156).

⁵ This "Dividends Payable" account is reproduced in Joint Exhibit 6-F. (R. 156-157.)

Of the twelve shareholders, seven nominally held one qualifying share each on account of others, and one was a corporation of Mary Pickford and Douglas Fairbanks. On September 17 and December 15, 1930, the net indebtedness of the shareholders to Studios was \$85,865.06 and \$90,818.87, respectively, distributed as follows ⁶ (R. 25-26):

| | <i>Sept. 17, 1930</i> | <i>Dec. 15, 1930</i> |
|--------------------------------------|-----------------------|----------------------|
| Feature Productions Inc., debit----- | \$4,133.41 | \$83,986.05 |
| Douglas Fairbanks, credit----- | 5,143.19 | 2,459.27 |
| Mary Pickford Fairbanks, debit----- | 21,913.27 | 1,324.69 |
| Samuel Goldwyn, Inc., debit----- | 64,961.57 | 3,948.86 |

The amounts of the indebtedness of the shareholders to Studios varied greatly from time to time. Up to June, 1933, the maximum indebtedness of Feature Productions was \$240,783.44 on February 18, 1933; of Mary Pickford, \$40,471 on December 31, 1932; of Samuel Goldwyn, Inc., \$116,299.98 on January 14, 1933; of Douglas Fairbanks, \$22,644.12 on July 23, 1932.⁷ (R. 26.)

⁶ These, Feature Productions, Inc., Samuel Goldwyn, Inc., Mary Pickford and Douglas Fairbanks, were in substance all of the stockholders of Studios, since the other stockholders held their respective qualifying shares for these stockholders.

⁷ The range in the amounts owed to Studios by Feature Productions, Samuel Goldwyn, Mary Pickford and Douglas Fairbanks, respectively, is illustrated by Respondent's Exhibits E, F, G and H. (R. 193-196.) These tabulations showing the amounts owed to Studios by the shareholders on various dates, respectively, were prepared by the taxpayer's witness, Mr. Ezzell, auditor and later general manager of Studios (R. 65-66), who, by agreement of counsel, submitted in that form the information which counsel for the Commissioner had sought to elicit on cross-examination (R. 106-113, 128-134). Also illustrative of the amounts owed Studios by the shareholders, respectively, are Respondent's Exhibits I, J, K and L (R. 197-204), which are reproductions of

On Studios' income tax return for the fiscal year 1931,⁸ the dividend was reported as declared on September 10, 1930, but unpaid at the end of the year, and the amount was shown under "Other Liabilities" as "Dividends Payable".⁹ During the fiscal years ended June 30, 1931, 1932, and 1933, Studios sustained statutory net losses of \$97,650.97, \$28,475.54, and \$101,349.36, respectively.¹⁰ (R. 26.)

Cash payment of the dividend declared in 1930 was not made, but on June 27, 1933, Feature Productions instructed Studios by letter¹¹ to apply to its indebtedness to Studios \$136,327.17, to which the dividend declaration entitled it, and \$28,000 of the dividend due to Mary Pickford and Douglas Fairbanks,¹² who had assigned this part to it (Feature). On the same

certain ledger sheets containing entries in the respective accounts of the shareholders during certain months of 1933 (R. iv, 128-134).

⁸ This is Respondent's Exhibit B. (R. 169-177.)

⁹ The aggregate amount of the unpaid dividend shown as a liability at the end of the year on the return for the fiscal year 1931 was \$204,656.67 (R. 173), which is the erroneous amount originally entered on the books (see journal entry of September 17, 1930, at R. 152)—before the correction heretofore mentioned. The return for the fiscal year ended 1932 (Resp. Ex. C, R. 178-185) shows the corrected figure of \$203,091 (R. 181) as the amount of the liability for the unpaid dividend at the end of that year, and, likewise, the return for the fiscal year ended 1933 (Resp. Ex. D, R. 186-193) shows the corrected amount of \$203,091 (R. 189) as the amount of the liability for the unpaid dividend at the beginning of that year.

¹⁰ See Respondent's Exhibits B, C and D at R. 169, 178, 186.

¹¹ This letter is Petitioner's Exhibit 2. (R. 159.)

¹² The letter as to this \$28,000 is Petitioner's Exhibit 1. (R. 158.)

date, shareholders Samuel Goldwyn, Inc., and Abraham Lehr similarly directed that \$20,979 and \$21 of the dividend due them, respectively, likewise be applied on debts to Studios.¹³ (R. 26.)

By journal entries dated May 27, 1933, the “dividends payable” account was debited with \$203,901 and credits were entered as follows (R. 27):

Accounts Receivable:

| | |
|--------------------------------|--------------|
| Feature Prod., Inc., Ltd_____ | \$164,327.17 |
| Samuel Goldwyn, Inc., Ltd_____ | 21,000.00 |
| Mary Pickford Fairbanks_____ | 6,649.87 |
| Douglas Fairbanks_____ | 5,695.03 |

Accounts Payable:

| | |
|------------------------------|----------|
| Mary Pickford Fairbanks_____ | 2,232.05 |
| Douglas Fairbanks_____ | 3,186.88 |

203,091.00

Explanation: To charge Accounts Receivable from stockholders against adjusted Dividends Payable to them and to credit any excess of dividends over such receivables to Accounts Payable. This entry per instructions of A. M. Brentinger. [manager]¹⁴

¹³ These letters are, respectively, Petitioner’s Exhibits 3 (R. 160) and 4 (R. 161). By his letter, Lehr authorized that the \$21 dividend payable to him be applied to the indebtedness of Samuel Goldwyn, Inc., to Studios. The record reveals no similar authorizations by the other individual holders of one share of stock, to each of whom the sum of \$21 was payable as a dividend (R. 152), although by checking the amounts of the credits finally made in 1933 (see R. 154) it will readily appear that four of such dividends were included in the credit to Feature Productions and two \$21 dividends were included in the credits to Mary Pickford and Douglas Fairbanks—the credit to the latter two also included the amount of the dividend (\$3,763.83) payable to their corporation, Pickford Fairbanks Studios (see R. 152).

¹⁴ Joint Exhibit 5–E (R. 154) on which this journal entry of May 27, 1933, is reproduced contains the following additional notation at the end thereof:

“See letters from Abraham Lehr, Samuel Goldwyn, Inc., Ltd., and Feature Prod. Inc., Ltd., dated 6/27/33 authorizing above—in dividend file.”

An appropriate journal entry¹⁵ likewise recorded the assignment to Feature Productions¹⁶ of \$28,000 of dividends due Mary Pickford and Douglas Fairbanks “leaving amount due last two named \$17,763.83.” (R. 27.) Only entries relating to this transfer were entered in the ledger account “Dividends Payable.”¹⁷ A credit balance of \$203,091 appears in the account prior to the fiscal year 1933, while there is no balance as of the end of that year. Under date of May 27, 1933, Studios sent a notice to Feature Productions that its account had been credited with \$164,327.17 “amount of dividend due you” and sent a like notice of a credit of \$21,000 to Samuel Goldwyn, Inc.¹⁸ (R. 27.)

On its income tax return for the fiscal year 1933 Studios reported as a liability at the beginning of the year dividends payable of \$203,091; at the end of the year, none. (R. 27–28.)¹⁹

¹⁵ This is reproduced in Joint Exhibit 4–D. (R. 153.)

¹⁶ The Tax Court at this point (R. 27) speaks of the entry as recording the assignment to “Samuel Goldwyn, Inc.”, which is obviously an error: The assignment was to Feature Productions, as clearly appears in Joint Exhibit 4–D (R. 153) and in Petitioner’s Exhibit 1 (R. 158); see also R. 137, 138–139.

¹⁷ This statement by the Tax Court appears to be in error: Joint Exhibit 6–F shows that a debit entry of \$203,091 was also made in the “Dividends Payable” account immediately following the May 27, 1933, entry relative to the assignment of the \$28,000 from Mary Pickford and Douglas Fairbanks to Feature Productions (R. 156)—indeed, this is reflected in the next sentence in the Tax Court’s findings to the effect that as of the end of the fiscal year 1933 the account no longer showed the previously existing credit balance of \$203,091.

¹⁸ Copies of these notices appear in Joint Exhibit 5–E. (R. 155.)

¹⁹ This appears at R. 189, in one of the schedules accompanying the return for that year, Respondent’s Exhibit D. (R. 186–193.)

Mary Pickford and Douglas Fairbanks reported receipt of their portions of the dividend in question (declared by Studios in 1930) in their income tax returns for 1933, attaching notes explanatory of the assignment of the \$28,000 to Feature Productions. In its consolidated return for 1931 Art Cinema Corporation, of which Feature Productions was a subsidiary, reported receipt of the dividend of \$136,327.17. (R. 28.)²⁰

In his income tax return for 1942 the taxpayer reported the dividend of \$800,000 paid to him by Studios as a return of capital—and hence did not include any part of it in his taxable gross income. The Commissioner determined that the sum of \$239,059.58 of that dividend constituted taxable income and accordingly increased the taxpayer's income by that amount and arrived at the deficiency of \$117,688.82 involved in this case. (R. 8-14, 28.)²¹

²⁰ As brought out in the record, however, Art Cinema took an offsetting deduction in its consolidated return in the same amount on account of the dividend reported received from Studios. (R. 140-141.)

²¹ In his determination, in addition to adding to the taxpayer's income for 1942 the portion of the dividend just referred to, the Commissioner also made another adjustment to the taxpayer's income whereby he added some \$1,000,000 to the capital gain reported by the taxpayer. (R. 10.) The other adjustment had been previously agreed to by the taxpayer (R. 10), and the additional income tax attributable thereto, as well as the additional income tax attributable to the portion of the 1942 dividend which the taxpayer concedes to be taxable income, had been covered by additional assessments made subsequent to the filing of the returns (R. 14), so that the deficiency finally determined by the Commissioner in the amount of \$117,688.82 relates entirely to the adjustment on account of the 1942 dividend in controversy in this case

Before the Tax Court, the parties by stipulation (R. 142-145) agreed that of the total dividend of \$800,000 received by the taxpayer in 1942, the sum of \$239,059.58 constituted a distribution of accumulated earnings and profits (and hence was taxable as income to the taxpayer, as determined by the Commissioner) if the \$203,091 dividend declared in 1930 reduced the earnings and profits of Studios in the fiscal year ended June 30, 1933, as determined by the Commissioner; but if the dividend declared in 1930 reduced earnings and profits in the fiscal year ended June 30, 1931, then only \$104,610.56 of the \$800,000 dividend of 1942 constituted a distribution of earnings and profits (R. 28).

Upon the basis of the foregoing findings, the Tax Court concluded that distribution of the dividend declared in 1930 was made in the fiscal year ended June 30, 1931, and the Studios' accumulated earnings and profits were reduced by the amount of it in that year—and, pursuant to the stipulation of the parties, the Tax Court accordingly decided that only \$104,610.56 of the \$800,000 dividend received by the taxpayer in 1942 constituted a distribution of earnings

(see R. 8-14)—hence, the statement made at the outset of the majority opinion of the Tax Court (R. 22-23), to the effect that the deficiency results only “in part” from the dividend adjustment in question, appears to be in error.

For the sake of clarity, it may be pointed out in passing that while the disputed item is an adjustment to 1942 income, the deficiency which was determined was for the year 1943, as the result of giving effect to the provisions of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, whereby the 1942 tax, being larger than the tax for 1943, becomes the 1943 tax: See the statement accompanying the deficiency notice. (R. 9-14.)

and profits. (R. 28, 36.)²² Upon the basis of these conclusions reached in the majority opinion of the Tax Court (five members of the Tax Court dissented (R. 36-46), as will be hereinafter brought out more fully), the Tax Court entered a decision against the Commissioner, finding no deficiency in tax for the year 1943 (R. 48).²³ The present review followed.

STATEMENT OF POINTS TO BE URGED

In the present review, the Commissioner urges and relies upon all of the points originally stated and set out by him (R. 207-209) in his petition for review and subsequently adopted by him in this Court (R. 219) as the points upon which he intends to rely. For present purposes, the points relied upon and urged by the Commissioner may be stated briefly as follows: (1) The Tax Court erred in holding and deciding that the earnings and profits of Studios were reduced in the fiscal year ended 1931 by the dividend declared in 1930 upon the declaration thereof and the book entries which were made in 1930, even though the declared dividend was not paid or distributed until the fiscal year 1933 when the respective shareholders' accounts were credited with their proportionate part of the dividend; (2) the Tax Court erred in holding and deciding, in the alternative, that in any event the earnings and profits of Studios were

²² While these statements appear in that portion of the Tax Court's majority opinion headed "FINDINGS OF FACT", they cannot, as will be hereinafter brought out, be regarded as findings.

²³ No deficiency, since, as already indicated in fn. 21, the tax attributable to the portion of the 1942 dividend which the taxpayer agreed was taxable, had already been assessed.

reduced in the fiscal year 1931 because the shareholders constructively received the dividend declared in 1930 in the fiscal year 1931; and (3) the Tax Court erred in holding and deciding that only \$104,610.56 of the \$800,000 dividend received by the taxpayer in 1942, constituted a distribution of earnings and profits and hence was subject to tax.

SUMMARY OF ARGUMENT

1. It is submitted that the majority of the Tax Court was clearly in error in failing to hold that the accumulated earnings and profits of Studios were not reduced by the dividend declared in 1930 until the fiscal year 1933, when the dividend was distributed by the credits then made against the respective indebtedness of the shareholders to Studios. The statute defines a dividend as a *distribution out of* accumulated earnings and profits. The plain terms of the statute clearly require the result contended for by the Commissioner, namely, that the accumulated earnings and profits of a corporation are not reduced until the distribution of a dividend by payment, actual or constructive. Hence, since in this case the dividend declared in 1930 was not distributed or paid to the shareholders until the fiscal year 1933, when it was credited against the indebtedness of the shareholders, the accumulated earnings and profits of Studios should not be held to have been reduced until that distribution was made during the fiscal year 1933. The holding of the majority of the Tax Court that the accumulated earnings and profits of Studios were reduced during the fiscal year 1931 by the dividend

declared in 1930 is clearly erroneous, as a matter of law, and therefore should be reversed.

The question presented to this Court on this point is a pure question of law, clearly reviewable. The question is exclusively one as to the proper meaning or interpretation of a provision of the statute, and this Court unquestionably has the power to review the decision of the Tax Court with respect thereto.

2. The majority of the Tax Court also erred in holding, in the alternative, that even if accumulated earnings and profits are not reduced until the distribution of a dividend, then in any event the accumulated earnings and profits of Studios were reduced in the fiscal year 1931 by the dividend declared in 1930 because the shareholders constructively received that dividend during the fiscal year 1931. It is true that under the rule of "constructive receipt" a dividend credited to a shareholder and unqualifiedly subject to his command, is taxable to him in the year of credit, whether or not withdrawn. In this case, however, the important elements essential as a matter of law to establish "constructive receipt" are absent: There was no segregation, and the dividend was not credited to the shareholders in the fiscal year 1931 in any manner which placed the funds under their unqualified dominion or control. Clearly, as a matter of law, there was no "constructive receipt" of the dividend by the shareholders during the fiscal year 1931 upon the facts of this case, and the holding to the contrary by the majority of the Tax Court should therefore be reversed.

This second or alternative question, just as the first question, is a pure question of law which this Court clearly has the power to review.

ARGUMENT

Preliminary

As heretofore brought out, the parties before the Tax Court had agreed that of the total dividend of \$800,000 received by the taxpayer in 1942, the amount of \$239,059.58 constituted a distribution of earnings and profits and hence was taxable to the taxpayer if the dividend declared in 1930 reduced earnings and profits of Studios in the fiscal year 1933; but if the dividend declared in 1930 reduced earnings and profits in the fiscal year 1931, then only \$104,610.56 of the \$800,000 1942 dividend constituted a distribution of earnings and profits and was taxable to the taxpayer. Thus, while in his return the taxpayer had treated the entire \$800,000 1942 dividend as nontaxable, he conceded before the Tax Court that at least \$104,610.56 thereof was taxable—while the Commissioner, on the other hand, had determined and contended before the Tax Court that \$239,059.58 of the 1942 dividend was taxable.

Hence, the controversy related only to the difference between those two figures, i. e., \$134,449.02. Under the Commissioner's view, the dividend declared in 1930 did not reduce earnings and profits until 1933 when it was paid: Hence, the June 30, 1930, accumulated earnings and profits of Studios amounting to \$286,399.32 are treated as being reduced by the losses subsequently sustained by Studios, with the result

that when the dividend declared in 1930 was paid in 1933, the then remaining accumulated earnings and profits could absorb only a portion (\$68,641.98) of it, and the balance (\$134,449.02)²⁴ of the dividend must be treated as paid from other than earnings and profits and accordingly is not charged against earnings and profits.²⁵ On the other hand, under the taxpayer's view, since the dividend declared in 1930 is treated as paid in the fiscal year 1931, the entire amount of that dividend is charged against earnings and profits in that year, with the result that under his computation the earnings and profits available for distribution in 1942 are \$134,449.02 less than under the Commissioner's computation.

In deciding the case against the Commissioner, the majority of the Tax Court held that the declaration of the dividend in 1930, coupled with the debit to sur-

²⁴ The Commissioner's computation whereby he arrived at the amount of \$239,059.58 which he determined was the extent to which the 1942 dividend constituted a distribution of accumulated earnings and profits is not contained in the record but, since the parties agreed as to the *amounts* in which under their respective theories the 1942 dividend constituted a distribution of earnings and profits, its absence is not material. The difference between those two amounts (\$239,059.58 and \$104,610.56), namely, \$134,449.02, represents the portion of the dividend declared in 1930 which under the Commissioner's view was not chargeable against earnings and profits when paid in 1933, and the difference between this last amount and the amount of the dividend declared in 1930 (\$203,091), namely, \$68,641.98, represents the portion of the dividend declared in 1930 chargeable against earnings and profits when paid in 1933.

²⁵ That the portion of the dividend which exceeded the then remaining accumulated earnings and profits was not chargeable against earnings and profits is clear. See *Henninger v. Commissioner*, 21 B. T. A. 1235.

plus and the credit to the "Dividends Payable" account, was sufficient to reduce accumulated earnings and profits in the fiscal year 1931, even though the distribution of the dividend to the shareholders be regarded as not having been made until the fiscal year 1933 when the amount thereof was credited against the indebtedness of the shareholders to Studios. In addition, the majority of the Tax Court further held, in the alternative, that even if the correct rule be that earnings and profits are not reduced until the distribution of a dividend, then in any event the earnings and profits of Studios were reduced in the fiscal year 1931 by the dividend declared in 1930 because the shareholders constructively received the dividend in the fiscal year 1931. (R. 28-36.)

Five members of the Tax Court dissented, Judge Disney writing a dissenting opinion, dissenting on both of the grounds relied upon by the majority, and three other members agreed with Judge Disney's dissenting opinion. (R. 36-46.)

The two grounds relied upon by the majority of the Tax Court will be discussed separately.

I

The Tax Court erred in failing to hold that the dividend declared in 1930 did not reduce accumulated earnings and profits until it was distributed in the fiscal year 1933

It is submitted that the majority of the Tax Court erroneously held, on this phase of the case, that the accumulated earnings and profits of Studios were reduced in the fiscal year 1931 by the dividend declared in 1930, instead of holding that the earnings and

profits were not reduced until the fiscal year 1933 when that dividend was distributed by the credits against the indebtedness of the shareholders to Studios.

The statute, Section 115 (a) of the Internal Revenue Code, *supra*, defines a dividend as a "distribution" by a corporation to its shareholders "out of" accumulated earnings and profits—and the term "dividends" was, insofar as here material, similarly defined in Section 115 (a) of the Revenue Act of 1928, *supra*, which was in force in 1930. As correctly pointed out in the dissenting opinion (R. 39-40), the term "distribution" means "division or apportionment among several or many," and therefore the dividend declared in 1930 cannot properly be regarded as having been "distributed," by the declaration or by the bookkeeping entries in 1930, *out of* the earnings and profits of Studios, within the plain terms of the statute. In other words, the plain terms of the statute, we submit, clearly require the result contended for by the Commissioner, namely, that the earnings and profits of a corporation are not reduced until the distribution of a dividend by actual or constructive payment. This view is in keeping with and fully supported by the settled rule that it is the distribution or payment of a dividend, and not the declaration, which governs for tax purposes. *Mason v. Routzahn*, 275 U. S. 175; *United States v. Phillips*, 24 F. 2d 195 (C. C. A. 3d); *Proctor v. Commissioner*, 11 B. T. A. 235; *Commissioner v. American L. & T. Co.*, 156 F. 2d 398 (C. C. A. 7th); *Tar Products Corp. v. Commissioner*, 130 F. 2d

866 (C. C. A. 3d); *Sanford Corp. v. Commissioner*, 106 F. 2d 882 (C. C. A. 3d). See also *Commissioner v. Scatena*, 85 F. 2d 729 (C. C. A. 9th); *Frederick Smith Enter. Co. v. Commissioner*, 167 F. 2d 357 (C. C. A. 9th); *Avery v. Commissioner*, 292 U. S. 210; *Putnam's Estate v. Commissioner*, 324 U. S. 393. The majority of the Tax Court recognized the rule just referred to (R. 31-32) but in arriving at its conclusion stated that the rule, applicable in determining the time when a dividend is taxable to the shareholder, is of no application in determining the time when earnings and profits of the corporation are reduced. The majority further stated that the dividend declaration gave rise to a debtor-creditor relationship between the corporation and the shareholders, and that, the amount of the dividend having been charged to surplus at that time, the earnings and profits of the corporation were reduced in the fiscal year 1931 by the declared dividend. (R. 32-33.)

In holding the above mentioned rule to be inapplicable in this case, the majority of the Tax Court makes the comment (R. 32) that the rule "is one of convenience rather than of strict law", citing *Commissioner v. American L. & T. Co.*, *supra*. It is true that the opinion in that case (p. 400) contains a statement which recognizes that one of the reasons for the rule is the administrative convenience in checking returns, but the opinion further recognizes that earnings and profits available for the payment of a dividend are to be determined as of the time of the payment of the dividend rather than the time of its declaration. There is nothing in the opinion in that

case, we believe, justifying the view that the rule is not one of law.²⁶

Entirely aside from this, it is submitted that the view of the majority, to the effect that there should be one rule for determining when the stockholders are taxable on a dividend and another rule for determining when earnings and profits are reduced, is unsound and illogical. The tax consequences of a dividend, including the time when it is taken into consideration for tax purposes, should be the same both as to the corporation and as to the stockholder, we submit. This is in keeping with other provisions of our income tax law. For example, under our income tax law, the earnings and profits of a corporation are not considered as distributed or reduced by a distribution upon which no gain to the distributee is recognized by law, or by a stock dividend which is non-taxable to the distributee. See Section 115 (h) of the Internal Revenue Code. *Commissioner v. Estate of Bedford*, 325 U. S. 283; cf. *Commissioner v. Wheeler*, 324 U. S. 542, and *Commissioner v. Munter*, 331 U. S. 210. Since for income tax purposes the treatment to the distributee controls in determining *whether* a distribution reduces earnings and profits of a corporation, it should likewise control in determining *when* the distribution reduces corporate earnings and profits. Hence in this case, since the date of payment or distribution, and not of declaration, deter-

²⁶ Cf. *Ross v. Commissioner*, 169 F. 2d 483, 493 (C. C. A. 1st), in which the court (in an opinion by Mr. Justice Frankfurter, sitting as Circuit Justice) holds that the rule of "constructive receipt" is one of law.

mines the taxability of a dividend to the shareholders, the date of payment or distribution likewise should determine the time when the earnings and profits of the corporation are reduced.

Therefore, since in the instant case the dividend declared in 1930 was not distributed or paid to the shareholders until the fiscal year 1933, when the amount thereof was credited against the indebtedness of the shareholders to Studios, the earnings and profits of Studios should not be held to have been reduced until that distribution of the dividend in the fiscal year 1933.

The fact that upon the mere declaration of a dividend a debtor-creditor relationship is generally recognized as coming into existence for many purposes as between the corporation and the shareholder, and the fact that the law of California (applicable here) conforms to that general rule, as pointed out in the majority opinion of the Tax Court (R. 30-31), should not be controlling in resolving the federal tax question involved here. See *Faris v. Helvering*, 71 F. 2d 610, 611 (C. C. A. 9th, certiorari denied, 293 U. S. 584. The question here is as to whether there has been a "distribution * * * out of" earnings and profits of a corporation within the terms of Section 115 (a), and the answer to that question should not be controlled by considerations as to whether for some other purposes, as between the corporation and the shareholder, a debtor-creditor relationship has come into existence upon the declaration of a dividend. In this connection, it may be pointed out that no controlling significance should be attached to the fact that, as

mentioned in the majority opinion (R. 30), the debtor-creditor concept was relied upon in some of the earlier cases involving the first excess profits tax law, in determining the effect of a declared dividend upon invested capital, such as *W. E. Caldwell Co. v. Commissioner*, 6 B. T. A. 47. An excess profits tax was also in force during the last war, under the new subchapter (SUBCHAPTER E. EXCESS PROFITS TAX) which was added to the Internal Revenue Code by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, entitled "Excess Profits Tax Act of 1940". In the Regulations promulgated thereunder, in prescribing the rules by which the daily equity invested capital is to be reduced by distributions, it is stated that a "distribution is considered to be made on the date that it is payable" and when no date for payment is set the "distribution is considered to be made on the date when it is declared". Treasury Regulations 112, Section 35.718-5. But, we submit, the provision of that regulation should have no significance in determining the question involved in this case. The determination of invested capital under Section 718 of the Code, for excess profits tax purposes, and the provisions of the Regulations for the reduction thereof by reason of corporate distributions, turn upon entirely different considerations, we submit, and therefore should be accorded no controlling effect upon the question involved in this case. Section 718 is a provision granting a credit from the excess profits tax based upon the amount of capital invested in the business venture, with certain specific additions and adjustments—in other words, it is a

provision written into the law to “establish a measure by which the amount of profits which were ‘excess’ could be judged”. See *West Construction Co. v. Commissioner*, 7 T. C. 974, 978. See also Report of a Subcommittee of the Committee on Ways and Means, House of Representatives, 67th Cong., 3d Sess., on Proposed Excess Profits Taxation (dated August 8, 1940), pp. 3, 5. Quite obviously, the Regulations thereunder establish rules for the reduction of the invested capital, upon which the credit is based, as soon, and as definitely as possible, in keeping with the legislative policy of allowing a credit from the excess profits tax based upon the amount of capital actually “being risked” in the business. See Report of subcommittee, *supra*, p. 3.

Similarly, in deciding the question presented in this case, no controlling significance should be attached to the fact that at the time of the declaration of the dividend an entry was made debiting the surplus account. That entry did not actually reduce the earnings and profits, we submit: The effect of Section 115 (a) is to require a “distribution” *out of* “earnings and profits”. It is well settled that bookkeeping entries are not controlling for tax purposes. See *Helvering v. Midland Ins. Co.*, 300 U. S. 216; *Bazley v. Commissioner*, 331 U. S. 737; *Edwards v. Douglas*, 269 U. S. 204. That the making of the entry may have been justified from an accounting standpoint, likewise should neither be controlling nor significant here, we submit. The Supreme Court has expressly recognized that the computation of earnings and profits in the tax sense “does not necessarily follow

corporate accounting concepts". *Commissioner v. Wheeler*, 324 U. S. 542, 546. See also *Commissioner v. Estate of Bedford*, *supra*. The fact that a credit in a corresponding amount was made to a "Dividends Payable" account really adds nothing to support the view that earnings and profits were reduced at the time of the declaration. The entry to that account still left the dividend unpaid, and has no more effect than if the amount had been entered in some so-called "suspense" account. Rather, as pointed out in the dissenting opinion (R. 43-44), the entry to "Dividends Payable" account and the fact that the amount of the dividend was carried as a "liability" until the year when it was actually paid, really tend to "nullify any possible effect from a debit to surplus".

The question here involved, whether the earnings and profits are reduced at the time of the declaration or at the time of payment of a dividend, for the purpose of determining the amount of earnings and profits thereafter available for future distributions, was considered and passed upon directly by the Board of Tax Appeals in *Proctor v. Commissioner*, *supra*, where it was decided that the date of payment controls. The majority of the Tax Court in this case, however, declined to follow the *Proctor* case, perhaps because it misunderstood it, since it seemed to regard the *Proctor* case as one of "those cases" which did not involve "the effect of the declaration or payment [of a dividend] on the corporation's own financial structure". (R. 32.) The *Proctor* case, we submit, although ultimately involving an issue as to the portion of a dividend taxable to the recipient, as does the

instant case in final analysis, involved the exact question presented in this case as to whether earnings and profits are reduced by the declaration or by the payment of a dividend. Insofar as we have been able to ascertain, the *Proctor* case is the only one which has passed directly upon the question, with the possible exception of one other Board case in which, upon the authority of the *Proctor* case, the Board held that the date of payment, and not the date of declaration, controls in computing earnings available for distribution. *James v. Commissioner*, 13 B. T. A. 764, 771, affirmed without discussion of this point, 49 F. 2d 707 (C. C. A. 1st).

Before closing the discussion of this point, it might be well to refer briefly to the question of whether this Court has the power to review and reverse the decision of the Tax Court on this point. We submit that it has such power, clearly and unmistakably, and that the Court should exercise it and should reverse the decision of the Tax Court. This case is different, we submit, from such cases as *Commissioner v. Rainier Brewing Co.*, 165 F. 2d 217, rehearing denied, 166 F. 2d 324; *Seattle Brewing Co. v. Commissioner*, 165 F. 2d 216, rehearing denied, 166 F. 2d 326; *Schweppe v. Commissioner*, 168 F. 2d 284, in which this Court, because of its interpretation of the so-called "*Dobson Rule*," declined to review decisions of the Tax Court. But this case, unlike those cases, we believe, presents a pure question of law as to the proper interpretation or meaning of the statute, in the light of undisputed facts, and a question of this type has been recognized to be reviewable even under

the *Dobson* rule. See *Strauss v. Commissioner*, 168 F. 2d 441 (C. C. A. 2d). The question presented in this case on this point is as to the proper interpretation of the statutory definition of a dividend. The question is not whether the facts meet the statutory requirements (as this Court said in the *Rainier* and *Seattle Brewing* cases, *supra*), but what the statute means—in other words, the question is not as to whether there are present those facts or elements which constitute a “distribution” by a corporation “out of” earnings and profits, but what facts or elements must be present to constitute such a “distribution” under the statute, and that is clearly a question of law which has been recognized to be reviewable even under the *Dobson* rule. See *Commissioner v. Revere Land Co.*, 169 F. 2d 469, 479–480 (C. C. A. 3d), certiorari denied, 335 U. S. 853. See also *Dobson v. Commissioner*, 320 U. S. 489; *Trust of Bingham v. Commissioner*, 325 U. S. 365; *Crane v. Commissioner*, 331 U. S. 1; *McWilliams v. Commissioner*, 331 U. S. 694; *Commissioner v. National Carbide Corp.*, 167 F. 2d 304 (C. C. A. 1st), certiorari granted, 335 U. S. 810. See also *Ross v. Commissioner*, 169 F. 2d 483, 489 (C. C. A. 1st), in which the court recognized that even under the *Dobson* rule, where the decision of the Tax Court is based upon a “misconception” of the applicable legal principles, the appellate court could review. See also *Commissioner v. Batten, Barton, Durstine & Osborn* (C. C. A. 2d), decided December 23, 1948.

In *Schweppe v. Commissioner*, *supra*, the issue as to whether the distribution was of earnings and profits

and therefore taxable as a dividend turned upon a question as to whether or not a certain sum had been received by the corporation as a gift—obviously a more factual question (or at least one of mixed fact and law, as this Court thought), than involved in the instant case. Likewise, the present case is different from such cases as *Bazley v. Commissioner*, 331 U. S. 737 (referred to by this Court in the *Schweppe* case), where the question was as to whether a “paper reorganization” was in reality a disguise for the distribution of a taxable dividend, which question the Supreme Court felt was to be left to the judgment of the Tax Court, citing the *Dobson* case.

The *Dobson* rule has now in effect been repealed by Section 36 of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., which gives the appellate courts power to review Tax Court decisions to the same extent as decisions of the District Courts in non-jury cases, with the result, we submit, of removing any possible doubt as to the reviewability of cases of this character. See *Commissioner v. Batten, Barton, Durstine & Osborn, supra*. See also *Hartz v. Commissioner* (C. A. 8th), decided October 27, 1948 (1948 P-H, par. 72,620), and *Kohl v. Commissioner* (C. A. 8th), decided November 12, 1948 (1948 P-H, par. 72,633).

Finally, before concluding the argument on this point, reference is made to the purported “findings” which the Tax Court included in the last paragraph (R. 28) of that part of the majority opinion, headed “FINDINGS OF FACT”. Those purported “findings” (to the effect that distribution of the dividend

declared in 1930 was made in the fiscal year 1931, and that earnings and profits were reduced in that year, and that only \$104,610.56 of the 1942 dividend was a distribution of earnings and profits) are not really findings, but conclusions of law, clearly reviewable, we submit. However, even if the purported findings were regarded as conclusions or findings of ultimate fact, they are likewise reviewable under broader scope of appellate review resulting from the effect of Rule 52 (a) of the Rules of Civil Procedure, which now governs. See *Aetna Life Ins. Co. v. Kepler*, 116 F. 2d 1, 4-5 (C. C. A. 8th). As has been recognized, if the ultimate finding is "contrary to the evidentiary findings or is based upon a misapplication of the law to the evidentiary findings", it is not binding upon the appellate court. *United States v. Armature Rewinding Co.*, 124 F. 2d 589, 591 (C. C. A. 8th). In the review of non-jury District Court cases, of course, the appellate court does not review the evidence or settle conflicts therein, or determine questions of credibility, but when the issue turns not upon credibility or conflict in the evidence, but upon the legal significance to be given to the facts, then the appellate court may substitute its view for that of the trial court and may reverse the findings and conclusion of the trial court. See *Campana Corp. v. Harrison*, 114 F. 2d 400, 405-406 (C. C. A. 7th); *United States v. Anderson*, 108 F. 2d 475, 478-479 (C. C. A. 7th). See also *Kuhn v. Princess Lida of Thurn & Taxis*, 119 F. 2d 704 (C. C. A. 3d). Even if the purported findings be regarded as mixed findings of fact and law, they would be reviewable. See *United States*

v. *Moroloy Bearing Service*, 124 F. 2d 373, where this Court reviewed and reversed certain findings, stating (p. 374) "The evidence is not substantially conflicting, and the findings in this respect involve mixed questions of law and fact."

It is submitted that, whether viewed as conclusions of law, or as conclusions or findings of mixed fact and law, or as conclusions or findings of ultimate fact, the purported "findings" above referred to are clearly reviewable by this Court. There was no question as to credibility, nor was there any conflict in the evidence in the case. In other words, there was no dispute as to the facts or as to what had transpired—the only controversy was as to the legal effect thereof. Since the conclusion drawn by the majority of the Tax Court as to the legal effect of the facts is unquestionably erroneous, this Court should reverse the holding of the majority on this question.

II

The Tax Court erred in holding, in the alternative, that in any event the earnings and profits were reduced in the fiscal year 1931 because the shareholders during that year constructively received the dividend declared in 1930

It is submitted that the holding of the majority of the Tax Court on this alternative question was also erroneous, and that the correct legal conclusion on the undisputed facts is that stated in the dissenting opinion (R. 37–39), namely, that there was no constructive receipt of the dividend by the shareholders in 1930, and that the dividend was actually not paid until 1933, when the amount thereof was credited against the indebtedness of the shareholders to Studios.

The fact that the corporate resolution made the dividend payable on December 15, 1930, is not, of course, controlling in determining the time when distribution took place. The wordings of corporate resolutions are not controlling for tax purposes. See *Tate v. Commissioner*, 97 F. 2d 658 (C. C. A. 8th), certiorari denied, 305 U. S. 639; *Phelps v. Commissioner*, 54 F. 2d 289 (C. C. A. 7th), certiorari denied, 285 U. S. 558; *United States v. Phellis*, 257 U. S. 156. See also *Sanborn v. Commissioner*, 88 F. 2d 134 (C. C. A. 8th), certiorari denied, 301 U. S. 700. The parties may well have intended that the dividend be paid in December, 1930, but, for some reason not shown by the record,²⁷ the dividend was not actually paid until

²⁷ As admitted during the testimony of the taxpayer's witness, the general manager of Studios, there is nothing in the corporate minutes indicating why the dividend was not paid in 1930. (R. 116-117.) The witness had earlier suggested an explanation as to why the credits to the individual accounts of the shareholders were not made until 1933: He stated (R. 93-94, 106) that the accounts of the shareholders in 1930 were broken down by "pictures" (i. e., the indebtedness of a shareholder was recorded in a separate account for each picture he was making) and he suggested that it would "not have been feasible" to make the credits then. Clearly, the explanation appears to be lacking in substance because, obviously, if it had really been desired that the dividend be paid in 1930, it certainly could have been done: All that it might have entailed was the making of some additional entries—according to the number of accounts, broken down by pictures, standing in the name of each shareholder. While the total number of existing accounts was not testified to directly by the witness, the four tabulations prepared by him, Respondent's Exhibits E, F, G and H (R. 193-196), heretofore referred to, do indicate that the accounts broken down by pictures were not so many in number. Only eleven of them are disclosed as existing on January 7, 1931 (which is near the "payable" date of the dividend, December 15, 1930), all eleven of them appearing in

1933. The treatment, for tax purposes, of the dividend should be determined by what was actually done and not by what was intended to be done, or what was originally planned. See *Jones v. Dawson*, 148 F. 2d 87, 90 (C. C. A. 10th). See also *Curtis v. Commissioner*, 89 F. 2d 736, 738 (C. C. A. 8th), and *Davidson v. Commissioner*, 305 U. S. 44, affirming 94 F. 2d 300 (C. C. A. 8th).

In dealing with the time when items are includible in income, the Treasury Regulations, in giving examples of "constructive receipt," have long provided that dividends are subject to tax "when unqualifiedly made subject to the demand of the shareholder." See Section 29.42-3 of Treasury Regulations 111, promulgated under the Internal Revenue Code, and Article 333 of Treasury Regulations 74, promulgated under the Revenue Act of 1928. In keeping with this provision, it has been repeatedly held that, as pointed out in the majority opinion of the Tax Court (R. 35), a dividend credited to a shareholder and unqualifiedly subject to his command, is taxable to him in the year of crediting, whether or not actually withdrawn. See *Hadley v. Commissioner*, 36 F. 2d 2 (App. D. C.); *A. D. Saenger, Inc. v. Commissioner*, 84 F. 2d 23 (C. C. A. 5th), certiorari denied, 299 U. S. 577; *Baker v. United States*, 17 F. Supp. 976 (C. Cls.); cf. *Avery v. Commissioner*, 292 U. S. 210. Similarly, as also

the tabulations respectively showing the indebtedness of Samuel Goldwyn, Inc. (R. 195) and Feature Productions (R. 196)—in each case the "N. P." item is not counted as a "picture" account, as undoubtedly it must be a designation of a "notes payable" account.

pointed out in the majority opinion (R. 35-36), payments by credit have been held sufficient for "dividends paid credit" purposes, if the dividend has been placed under complete control of the shareholder and removed from the control of the corporation. See *R. H. Bouligny, Inc. v. Commissioner*, 45 B. T. A. 456; *Valley Lumber Co. v. Commissioner*, 43 B. T. A. 423; *Atlantic Land Co. v. Commissioner*, 43 B. T. A. 474; and *Valley Tractor & Equipment Co. v. Commissioner*, 42 B. T. A. 311.

We neither deny nor disagree with the rule of "constructive receipt" of dividends referred to by the Tax Court majority, but we do maintain that under the facts of this case a holding that there was constructive receipt under that rule is clearly erroneous, as a matter of law. As recognized in the *Hadley* case, *supra* (p. 544) "the mere declaration of a dividend does not constitute either a dividend or a distribution"; in addition to the declaration, "funds [must be] set aside for its payment" and there must be, if not actual payment, such crediting to the account of the shareholder as to bring the funds under "the absolute and unqualified dominion and control" of the shareholder. These important elements are absent in this case, and the correct legal conclusion, upon the facts of this case, therefore, is that there was no constructive receipt. See *Korfund Co. v. Commissioner*, 1 T. C. 1180.

In passing upon the question of "constructive receipt" of dividends, this Court has definitely recognized that a "segregation" must be made in order

that a dividend may be regarded as constructively received.²⁸ See *Commissioner v. Scatena*, 85 F. 2d 729, 731. And in *Lawrence v. Commissioner*, 143 F. 2d 456, 457, this Court, while recognizing that a dividend credited on the books may be taxable, pointed out that it is “essential that the shareholder have an absolute right of withdrawal”. In the more recent case of *Frederick Smith Enter. Co. v. Commissioner*, 167 F. 2d 357 (C. C. A. 9th), where a dividend was declared within time to entitle the taxpayer to a credit but was not paid until thereafter, it was held that the date the dividend was actually paid controlled, in spite of arguments to the effect that the stockholders were indebted to the corporation in excess of the dividend, so that the two obligations were set off against each other as a matter of law, and that there was an agreement between the corporation and the stockholders to offset their dividends against their accounts.

It is submitted that under the facts of this case there was no control, as a matter of law. The dissenting opinion (R. 38) states that it is “obvious that the corporation had not lost, nor the stockholder acquired, control over the dividend”. As correctly observed in the dissenting opinion (R. 38), the mere crediting of the amount of the dividend to a “dividends payable” ledger account, in which the amount

²⁸ There was clearly no showing of any segregation by Studios in this case. No segregation or allocation of assets is revealed by the balance sheets accompanying its returns for the fiscal years ended 1931, 1932 and 1933, respectively. (R. 171-172, 179-180, 187-188.)

due each shareholder was shown, did not transfer control to the shareholders, no more than the usual entries to "bills payable" or "notes payable" accounts on corporate books transfer control over those accounts to the payee. As also properly observed in the dissenting opinion (R. 38), to have constructive receipt a showing is required that a shareholder could "get his money at any time". There is no testimony or other proof to that effect in the record in this case, and no such finding was made either in the findings of fact or in the majority opinion—and the dissenting opinion states (R. 39) that "such a showing is wholly absent here".

The majority opinion seems to suggest that control is inferable from the June 27, 1933, letters by the stockholders to the corporation directing the disposition of the dividend, and the opinion states that on the date of the letters the stockholders "had over the dividends an unqualified control which the corporation recognized". (R. 34-35.) We submit that the record establishes conclusively that such an inference is neither proper nor permissible in this case. The letters (R. 158, 159, 160, 161) purporting to convey to Studios instructions as to the disposition of the dividend were written on June 27, 1933—at least they bear that date, and in the majority opinion it is found that the instructions to Studios were given on that date (R. 26.) On the other hand, the record discloses that a month prior thereto, namely, on May 27, 1933, a journal entry was made (R. 154) providing for the debiting of the amount of the dividend to the "Divi-

dends Payable” account and the crediting of the amount thereof to the accounts of the shareholders; on the same date, May 27, 1933, a journal entry (R. 153) was made to reflect the assignment of \$28,000 of the dividend by Mary Pickford and Douglas Fairbanks to Feature Productions; and also on the same date, May 27, 1933, entries to reflect these matters were made in the “Dividends Payable” account (R. 156). Moreover, the record discloses that on the same date, May 27, 1933, Studios sent notices to the shareholders to the effect that their respective accounts had been credited with the amount of the dividend. (R. 155.) The taxpayer’s witness testified that the two 1933 journal entries (R. 153, 154) were made by him; that the two credit memoranda (R. 155) were prepared under his instructions; and that the entries in the “Dividends Payable” account were prepared under his supervision (R. 94–95). He further stated that the entries were made on the instructions of the then general manager of Studios (the witness at that time was auditor of Studios), whose instructions in turn “were predicated on written instructions received from the shareholders” (R. 95)—and those purported written instructions were identified as the letters of June 27, 1933 (R. 95–99), namely, letters coming one month after the dividend had already been credited to the shareholders. In the light of this record, we submit, it would be absolutely improper to infer any “control” in this case from those letters.

It is submitted that there are absent in this case the elements necessary, as a matter of law, to regard the dividend as constructively paid at any time before

its actual payment by the credits to the individual accounts of the shareholders. Aside from the entries debiting surplus and crediting the "Dividends Payable" account, which are of no significance, all that there really was before that time was the declaration of the dividend and that cannot amount to a "distribution" under the statute. As stated by the Supreme Court in *Avery v. Commissioner*, 292 U. S. 210, 215: "The mere promise or obligation of the corporation to pay on a given date was not enough to subject to petitioner's unqualified demand 'cash or other property'; * * *."

Finally, we submit that this alternative question in the case presents, just as the first or main question, a question of law reviewable by this Court, for the same reason which we advanced to show the reviewability on the first question and, since the holding or conclusion of the majority of the Tax Court on this alternative question is also erroneous, it should be reversed.

CONCLUSION

It is submitted that the decision of the Tax Court is erroneous and should be reversed, with directions to reinstate the deficiency determined by the Commissioner.

Respectfully submitted.

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JANUARY 1949.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
v.

SAMUEL GOLDWYN,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 12037

COMMISSIONER OF INTERNAL REVENUE,
Petitioner;

v.

SAMUEL GOLDWYN,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

Jurisdiction

Samuel Goldwyn, respondent on review, is an individual residing in Beverly Hills, California. He filed his income tax returns for the taxable years 1942 and 1943 here involved with the Collector of Internal Revenue for the Sixth District of California (R. 23). By letter dated June 29, 1945 (R. 8-14), petitioner on review notified respondent that the determination of his income tax liability for the taxable year ended December 31, 1943, disclosed a deficiency of \$117,688.82. Said deficiency arises in the following manner:

Respondent in his income tax return for 1942 did not include the distribution of \$800,000.00 received by him from Samuel Goldwyn Studios, a California corporation, on the ground that it was a return of capital (R. 10). Subsequently, upon examination of said return, it was determined that the aforesaid \$800,000.00 was taxable to respondent to the extent of \$104,610.56. The adjustment was agreed to by respondent and the deficiency arising therefrom was duly paid by him (R. 14). Thereafter, the Commissioner determined that of the aforesaid distribution of \$800,000.00, \$239,059.58 constituted taxable income and increased respondent's income by that amount, which resulted in the tax deficiency of \$117,688.82 involved in this case (R. 8-14).

Within ninety days after the notice of deficiency, namely, on July 19, 1945 (R. 1), respondent filed with The Tax Court of the United States a petition for a redetermination of the aforesaid deficiency. On November 17, 1947, the Tax Court entered its decision (R. 48) that there is no deficiency for the year 1943. Within three months thereafter, namely, on February 4, 1948, petitioner on review filed his petition (R. 205-209) in this Court for a review of the decision of the Tax Court, pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

Question Presented

Did the Tax Court commit error in determining that of the distribution of \$800,000.00 made to respondent by Samuel Goldwyn Studios on December 31, 1942, the sum of \$104,610.56 constituted a distribution of accumulated earnings and profits?

Since the parties have stipulated (R. 144-145) that the amount of the 1942 distribution which constitutes accumulated earnings and profits in turn rests upon whether a dividend declared September 11, 1930, reduced accumulated

earnings and profits in the fiscal year of declaration, namely, June 30, 1931, or in the fiscal year ended June 30, 1933, the Tax Court's decision is correct if

1. The Tax Court's determination that the dividend of September 11, 1930, was, under all the circumstances of the case, constructively received by the stockholders of the declaring corporation in the fiscal year ended June 30, 1931 thereby reducing accumulated earnings and profits in that year is supported by substantial evidence and is not clearly erroneous, or if

2. The Tax Court committed no error in holding that, irrespective of the time the dividend of September 11, 1930, was received by the stockholders, the declaration of such dividend reduced accumulated earnings or profits in the fiscal year ended June 30, 1931.

Statutes Involved

Internal Revenue Code:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend.*—The term “dividend” when used in this chapter (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

(b) *Source of Distributions.*—For the purposes of this chapter every distribution is made out of

earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits.

* * *

(26 U. S. C. 1946 ed., Sec. 115.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of dividend.*—The term “dividend” when used in this title (except in section 203 (a) (4) and section 208 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

(b) *Source of distributions.*—For the purposes of this Act every distribution is made out of earning or profits to the extent thereof, and from the most recently accumulated earnings or profits. * * *

* * * * *

Statement of Case

In respondent's view the statement of the case made by petitioner in his brief (Pet. Br. pp. 4-13, inclusive), by confining itself to the findings of fact by the Tax Court, fails to afford a complete statement of the evidence in the record of this case. The following statement is accordingly submitted on the basis of the Tax Court's findings (R. 23-28), the stipulation of facts by the parties (R. 142-145), the exhibits (R. 145-203) and the uncontradicted testimony (R. 65-123).

Taxpayer, on December 14, 1942, acquired all the outstanding stock of Samuel Goldwyn Studios, a California corporation, formerly known as United Artists Studio Corporation (R. 142-143) and was the owner of all such stock on December 31, 1942 (R. 143). The corporation will hereinafter be referred to as “Studios” or as the “declaring corporation”.

At a special meeting of the Board of Directors of Studios on November 30, 1942, resolutions were duly adopted to reduce the par value of the capital stock of Studios from \$50 to \$10 per share, and to reduce the stated capital of Studios. These reductions produced a reduction surplus account of \$870,390.00 (R. 142-143, 145-148). It was further resolved that there be withdrawn and distributed out of said reduction surplus account to the stockholders, in cash and in property, or in either, assets of Studios in the amount of \$800,000.00 (R. 147).

In pursuance of such corporate resolutions and action, Studios, on December 31, 1942, distributed to the taxpayer the sum of \$800,000.00 (R. 143). It is the determination by the Tax Court as to what portion of this sum constitutes a distribution of earnings or profits which is the subject of this appeal.

In 1930 Studios had five stockholders, aside from the holders of qualifying shares (R. 144, 152). The stockholders were Feature Productions, Inc., Ltd.; Pickford-Fairbanks Studios; Mary Pickford Fairbanks; Douglas Fairbanks and Samuel Goldwyn, Inc., Ltd. (R. 144, 152). The controlling stockholder of Studios was Feature Productions, Inc., Ltd., a corporation engaged solely in the production of motion pictures (R. 70-71). In 1930 Feature Productions, Inc., Ltd., owned 6,491.77 shares of Studios or approximately 66% of its outstanding stock, and had control under an agreement to purchase, approximately an additional 23% of such stock, or an aggregate of approximately 90% (R. 70-71). The sole stockholder of Feature Productions, Inc., Ltd., was Art Cinema Corporation.

Studios was organized as a California corporation in 1926 (R. 74) for the purpose of acquiring, owning and making available to its stockholders, who were engaged in the production of motion pictures, studio facilities for the production of such pictures (R. 74-78). The stockholders leased office space from Studios and when engaged in the making of a picture, leased from Studios stage space, exterior lot space, various types of equipment, services

and facilities for recording sound and craft labor services (R. 78). Because of the nature of the operation of the studio it was essential that the stockholders have a close working knowledge of the operations of the studio so that they could dovetail their own production into the studio's operations (R. 77-78). All of the stockholders of Studios were represented on its board of directors and took an active part, in the affairs of the corporation in which they were vitally interested. They were well informed at all times of the operations and the financial condition of Studios (R. 78). Studios' controlling stockholder, Feature Productions, Inc., Ltd., maintained its offices on the premises of Studios (R. 78).

The board of directors of Studios consisted of the following individuals:

A. M. BRENTINGER—who was Vice President and General Manager of Studios and General Manager of Feature Productions, Inc., Ltd., Studios' controlling stockholder (R. 75)

ABRAHAM LEHR—who was Vice President, a Director and Acting General Manager of Samuel Goldwyn, Inc., Ltd., another of Studios' stockholders (R. 75)

JOSEPH M. SCHENCK—who was President of Art Cinema Corporation, the parent company of Feature Productions, Inc., Studios' aforesaid controlling stockholder (R. 75-76)

MARK FEILER—who was a relative of Joseph M. Schenck (R. 75)

N. A. MCKAY—who was business manager for Mary Pickford Fairbanks, another stockholder of Studios (R. 76)

ROBERT P. FAIRBANKS—who was President of Studios, was a brother of Douglas Fairbanks, another stockholder of Studios (R. 76)

Studios billed its stockholders for the use of labor and material on a daily basis (R. 78-79). The stockholders were

billed also on a daily basis for any equipment which was customarily rented on a daily basis. They were billed daily for the so-called production day charge, which was an over-all charge for the right and privilege of photographing on the studio premises. The stockholders were billed weekly and made payment weekly for office space and certain other items which were rented on a weekly basis (R. 79).

The stockholder-producers of Studios paid their general accounts weekly if the requirements of Studios necessitated it. If Studios did not need the funds for current operations, payments were made as the need for funds arose (R. 79).

The stockholders of Studios maintained running accounts with their corporation (R. 80). Such accounts were set up in 1930 on a picture by picture basis (R. 82). They were not so set up in the year 1933 (R. 82).

On September 17, 1930, the total indebtedness of the stockholders of Studios to that corporation was \$85,865.06 (R. 82). On December 15, 1930, the total indebtedness due from stockholders to the corporation was \$90,818.87 (R. 83).

On September 11, 1930, by resolution of its board of directors Studios declared a cash dividend of \$21.00 per share to all stockholders of record as of September 10, 1930, payable December 15, 1930 (R. 143, 150-151).

On September 17, 1930, pursuant to the aforesaid resolution of September 11, 1930, surplus of Studios was charged in the amount of the dividend and the stockholders of Studios were credited with their respective proportions of the dividend (R. 25, 144, 152). The amount actually charged to surplus was \$204,656.67, rather than \$203,091.00 the amount of the dividend, because of the erroneous inclusion of the sum of \$1,565.67 and the erroneous crediting of Samuel Goldwyn, Inc., Ltd., with the same amount. The error in the amount of \$1,565.67 was subsequently corrected by a reversing entry (R. 91).

The charge to surplus and the credit to stockholders in the amount of the dividend were unrestricted (R. 152). The stockholders knew immediately of the dividend declaration and the unrestricted crediting of the respective amounts to them through their representation on the board of directors (R. 24, 75-77), their close working relationship with the declaring corporation and their knowledge of the operations and financial status of that corporation (R. 77-78) and through the furnishing of monthly financial reports to them by Studios (R. 85, 87).

On June 30, 1930, surplus or accumulated earnings or profits of Studios was \$286,399.42 (R. 143) and on June 30, 1931, after the charge of the dividend in the amount of \$203,091.00 had been made, the earned surplus of the corporation was \$58,971.12 (R. 89, 90, 125). The net worth of Studios on July 1, 1930 was \$1,129,786.10 (R. 90). On July 1, 1931, the net worth of Studios was \$1,026,071.12 (R. 90).

Both prior to 1930 and subsequent thereto Studios was able to and did borrow substantial sums of money both from its controlling stockholder Feature Productions, Inc., Ltd. and from commercial banks (R. 90, 91).

Feature Productions, Inc., the aforesaid controlling stockholder of Studios, took its share of the dividend of September 11, 1930, as income in its taxable year in which the dividend declaration was made, namely, its fiscal year ended June 30, 1931 (R. 122), specifically identifying the dividend as having been received from Studios in Schedule H of its return in the fiscal year ended June 30, 1931 (R. 141).

No instructions as to the disposition of their respective shares of the dividend of September 11, 1930, were received from the stockholders of Studios until the fiscal year ended June 30, 1933, when the stockholders instructed Studios to apply the amounts thereof against the indebtedness of the stockholders to Studios (R. 93-94).

The parties have stipulated (R. 144-145) that if the accumulated earnings and profits of Studios were reduced

in the fiscal year ended June 30, 1931, by the sum of \$203,091.00 then, of the \$800,000.00 distributed to taxpayer by Studios on December 31, 1942, \$104,610.56 constituted a distribution of accumulated earnings or profits; that if such reduction took place in the fiscal year ended June 30, 1933, then, of the \$800,000.00, the sum of \$239,059.58 constituted a distribution of accumulated earnings or profits.

Statement of Points to be Urged

1. The determination of the Tax Court that the dividend of September 11, 1930, was, under all the circumstances of the case, distributed to the stockholders in the fiscal year ended June 30, 1931, and reduced accumulated earnings or profits of the declaring corporation in that year, is a fact determination supported by substantial evidence and is clearly correct.

2. Irrespective of the time when the dividend of September 11, 1930, was distributed, the declaration of that dividend created a liability of the corporation and correspondingly reduced accumulated earnings or profits in the fiscal year ended June 30, 1931, and the Tax Court committed no error in so holding.

Summary of Argument

The basic question presented by this appeal is whether the Tax Court committed error in finding that the earnings or profits of Studios had been reduced by the dividend declared September 11, 1930, in the fiscal year ended June 30, 1931 (R. 28). The Tax Court's determination is correct either if:

(1) The distribution of the dividend declared September 11, 1930, was, under all circumstances of this case, made in the fiscal year ended June 30, 1931, or

(2) Irrespective of the time of distribution, the unqualified declaration of the dividend on September 11, 1930, payable December 15, 1930, to stockholders of record on September 10, 1930, correspondingly reduced earnings or profits in the fiscal year ended June 30, 1931.

The taxpayer contends that

(1) The determination of when a dividend is received by stockholders is a question of fact to be resolved in the circumstances of the individual case. The Tax Court had ample evidence in this record to support its determination that the dividend was constructively received by the stockholders in the fiscal year of declaration, namely, the year ended June 30, 1931, and the decision is clearly correct. No question of law is presented on this point.

(2) The declaration of the dividend of September 11, 1930, in and of itself operated to create a liability owing by the corporation to its stockholders in the amount of the dividend and thereby reduced the corporation's accumulated earnings or profits at the time of declaration.

The basic fallacy of the Commissioner and the dissenting Tax Court minority is the assumption that Section 115(a) of the Internal Revenue Code abrogates the established rule that the declaration of a dividend requires the reduction of earnings or profits. They assume that earnings or profits are only reduced by the distribution of a dividend. Section 115(a) does not, in any respect, attempt to define earnings or profits, or to provide when or in what manner they are reduced. It merely fixes the tax liability of a shareholder upon a corporate distribution. For that purpose it provides that the term "dividend" means a distribution either out of earnings or profits accumulated after February 28, 1913, or out of earnings or profits of the taxable year computed as of the close of the year without regard to earnings or profits at the date of distribution. It does not state that a reduction of earnings is

effected only by a distribution or that there is any relationship between the two. On the contrary, it specifically provides for the computation of earnings or profits at the close of the corporation's taxable year without regard to whether there were any earnings or profits at the date of distribution.

ARGUMENT

Preliminary

As previously stated, the question for determination is what portion of the \$800,000.00 distribution received by the taxpayer in 1942 represents a distribution of earnings or profits and what portion constitutes a return of capital. The parties have stipulated that if the accumulated earnings or profits of the declaring corporation were reduced by a dividend in the fiscal year ended June 30, 1931, then, of the \$800,000.00, the sum of \$104,610.56 constituted a distribution of accumulated earnings or profits; that if such reduction took place in the fiscal year ended June 30, 1933, then, of the \$800,000.00, the sum of \$239,059.58, constituted a distribution of accumulated earnings or profits (R. 144-145).

The Tax Court found that the dividend was distributed in the fiscal year ended June 30, 1931, and that Studios' accumulated earnings or profits were reduced by the amount of the dividend (\$203,091.00) in that year (R. 28, 36). Accordingly, pursuant to the stipulation of the parties, the Tax Court found that of the \$800,000.00 received by the petitioner in 1942 the sum of \$104,610.56 constituted a distribution of earnings or profits (R. 28, 36).

I.

The determination of the Tax Court that, in the light of the undisputed evidence in the record, the dividend declared on September 15, 1930 was constructively received by the stockholders in the fiscal year of declaration, is abundantly supported by the evidence and the Tax Court committed no error in so determining.

On this point the statement of the question asserted by petitioner on review (Pet. Br. p. 2) is incorrect. To say that the main question "turns upon * * * whether that dividend (the dividend of September 11, 1930) was not 'distributed' and the earnings and profits were not reduced until the fiscal year ended in 1933, when it was actually paid," is a bald assumption of the very fact in issue. The Tax Court found that the dividend was paid to the stockholders in the fiscal year ended June 30, 1931 (R. 28, 36). Petitioner's statement that the dividend was actually paid in 1933 contradicts the Tax Court's decision. The correct question is whether the Tax Court's determination that the dividend was paid in the fiscal year ended June 30, 1931 and reduced accumulated earnings or profits of the declaring corporation in that year is supported by substantial evidence and is not clearly erroneous.

Taxpayer desires to call to the attention of this Court the fact that at the time the dissenting opinion was written the Tax Court had erroneously found that the controlling stockholder of Studios had reported receipt of its proportionate share of the dividend of September 11, 1930, in a consolidated return for 1933 instead of 1931. This error was corrected by the Tax Court, *sua sponte*, by order dated October 24, 1947 (R. 47). As corrected, the finding is that the controlling stockholder reported receipt of its share of the dividend in a consolidated return for 1931 (fiscal year ended June 30, 1931) (R. 28). The finding involved is highly material since the action of the controlling stock-

holder lends substantial support to the determination that the dividend was constructively received by the stockholders in the year of declaration.

The Commissioner agrees (Pet. Br. p. 32-33) that dividends are taxable to a stockholder as constructively received when they are unqualifiedly subject to his demand. The rule has been stated as follows:

“A charge to surplus and credit to stockholders will give rise to the distribution of a dividend if the income is thereby made unqualifiedly subject to the demand of and withdrawal by stockholders.”

Mertens, Law of Federal Income Taxation, Sec. 9.07.

To the same effect see *A. D. Saenger, Inc. v. Commissioner*, 84 F. (2d) 23 (C.C.A. 5th, 1936), cert. den. 299 U.S. 577; *W. B. Brooks*, 12 B.T.A. 31 (1928), aff'd 35 F. (2d) 178 (C.C.A. 4th, 1929), 8 A.F.T.R. 9681; *Hadley v. Commissioner*, 36 F. (2d) 543 (Ct. of App. Dist. of Col., 1929); *Eakins v. U. S.*, 36 F. (2d) 961 (E.D.N.Y., 1930); *George E. Towle*, 19 B.T.A. 208 (1930), Acq. IX-2, C.B. 65, *E. Gordon Perry*, 28 B.T.A. 497 (1933); *Jacobus v. U. S.*, 9 F. Supp. 41, 46 (Ct. Cls. 1934); *Leon S. Herbert*, 32 B.T.A. 372 (1935), aff'd 81 F. (2d) 912 (C.C.A. 3rd, 1936).

In *Lawrence, et al. v. Commissioner*, 143 F. (2d) 456 (C.C.A. 9th, 1944), this Court stated the rule of constructive receipt as follows (p. 458):

“It is true that a dividend may be taxable to a stockholder as income when it is declared, even though it be left to his credit on the corporate books and not actually paid to him. However, it is essential that the stockholder have an absolute right of withdrawal.”

The Tax Court found that in the fiscal year 1931 the dividend of September 11, 1930 was charged against surplus and that each of the shareholders was credited with his proportionate share of the amount declared as a divi-

dend (R. 25). The Tax Court determined that, in the circumstances of the case, the stockholders had thereby secured complete control of the dividend (R. 36).

The question of whether a dividend is unqualifiedly subject to the demand of a stockholder is a question of fact. Cf. *Ross v. Commissioner*, 169 F. (2d) 483, 491 (C.C.A. 1st, 1948), where Mr. Justice Frankfurter, sitting as a Circuit Justice, stated:

“We need not determine here whether or not, in the light of the restrictive agreements and the financial status of the corporation, petitioner’s accrued salary was unqualifiedly subject to his demand in the years 1927 through 1932. These are questions of fact to be determined by findings of the Tax Court.”

The Commissioner is wrong in stating (Pet. Br. p. 26) that the case at bar, unlike *Commissioner v. Rainier Brewing Co.*, 165 F. (2d) 217, rehearing denied, 166 F. (2d) 324; *Seattle Brewing Co. v. Commissioner*, 165 F. (2d) 216, rehearing denied, 166 F. (2d) 326; and *Schweppe v. Commissioner*, 168 F. (2d) 284, “presents a pure question of law as to the proper interpretation or meaning of the statute, in the light of undisputed facts.”

Section 1141 of the Internal Revenue Code, as amended, gives the Circuit Courts of Appeals jurisdiction to review decisions of the Tax Court in the same manner and to the same extent as the decisions of the district courts in civil actions tried without a jury. Reviewability of district court decisions is governed by Rule 52(a) of the Federal Rules of Civil Procedure, in effect September 16, 1938 which reads in part as follows:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

The scope of "clearly erroneous" has been considered by this Court on numerous occasions. The holdings cover a wide range of lower court findings. The general rule is that the finding is presumptively correct and stands unless some obvious error of law has intervened or a lack of substantial evidence exists, *Wingate v. Bercut*, 146 F. (2d) 725 (C.C.A. 9th, 1944); *Alexander v. Johnston*, 137 F. (2d) 712, 713 (C.C.A. 9th, 1943), and cases cited therein; *Ralph N. Brodie et al. v. Hydraulic Press Mfg. Co.*, 151 F. (2d) 91 (C.C.A. 9th, 1945).

In *Lawrence v. Commissioner*, 143 F. (2d) 456 (C.C.A. 9th, 1944), this Court in considering the question of constructive receipt of a dividend stated (143 F. (2d) at page 459):

"Petitioners point out various circumstances that would suffice to support a finding to the contrary. We do not consider them. When the findings of the Tax Court are supported by substantial evidence we have no power to consider the relative weight of evidence to the contrary. *Wilmington Trust Co. v. Helvering*, 316 U.S. 164, 168, 62 S. Ct. 984, 86 L. Ed. 1352."

The determination by the Tax Court that, under all the circumstances of the case, the dividend of September 11, 1930, was constructively received by the stockholders of Studios in the fiscal year ended June 30, 1931, is supported by substantial evidence and the Court committed no clear error with respect to such determination. The entries of September 17, 1930, charging the surplus account of Studios with the amount of the September 11, 1930 dividend and crediting the stockholders proportionately with the amount of the dividend were without limitations, qualifications or restrictions (R. 152-156). The undisputed evidence is that at that time Studios was a closely held corporation (R. 152) consisting in substance, as the Commissioner recognizes (Pet. Br. p. 7), of Feature Productions, Inc., Ltd., Samuel Goldwyn, Inc., Ltd., Mary Pickford and Douglas Fairbanks.

All of such stockholders were engaged in the production of motion pictures; and Studios had been organized to furnish studio facilities for such production (R. 75). The business activities of Studios were closely integrated with those of its stockholders (R. 70-78). All the stockholders were represented on the corporation's board of directors (R. 24, 77) and had been so represented at the meeting at which the dividend was declared (R. 150). All the stockholders took an active part in Studios' affairs (R. 24, 77) and were well informed of the operations and the financial condition of the corporation at all times (R. 78), as the nature of their relationship in fact required (R. 77, 78).

Studios' controlling stockholder, Feature Productions, Inc., Ltd., owning outright about 66% of Studios' outstanding stock and having under agreement the right to purchase an additional 23% of said stock, or an aggregate of about 90% thereof (R. 70-71), maintained its offices on the premises of Studios (R. 70). In addition, periodic financial reports were issued by Studios to its stockholders at intervals of not less than a month or more frequently if requested by a stockholder (R. 85).

The entire picture is one of a closely held, well-integrated, cooperative enterprise, in which the stockholders were required to and did exercise a complete control over the conduct of the affairs of their corporation, wherein they participated through their representatives in declaring the September 11, 1930 dividend payable December 15, 1930, wherein the corporation was able to pay the dividend, and wherein also, following the declaration, the dividend was charged against surplus, was unrestrictedly credited to the individual stockholders proportionately, and was unqualifiedly available to them. The fact that they did not direct the disposition of the dividend until 1933 is immaterial.

Constructive receipt has been found in cases which are weaker factually than the instant case, and in some of such cases the Commissioner has acquiesced in the decisions.

In *E. Gordon Perry*, 28 B.T.A. 497, (1933) where a husband and wife owned 80% of the capital stock of the declaring corporation of which the husband was president, a crediting of the husband's account with the corporation and a debiting of the corporation's surplus account was held by the Tax Court (then the Board of Tax Appeals) to constitute a distribution of the dividend, despite the fact that the dividend was not actually withdrawn until a subsequent taxable year. The husband and wife had reported the dividend in their returns and maintained that the dividend was constructively received in the year of crediting. The Commissioner maintained that there was no receipt until actual withdrawal. Yet in that case there were no findings as to the actual control exercised by either spouse over the corporation; or as to their knowledge of the operations of the corporation; or as to any factors other than stock ownership and the entries charging surplus and crediting the husband's account.

In *George E. Towle*, 19 B.T.A. 208, (1930) the petitioner and another individual each owned 50% of the stock of a corporation. Following the incorporation petitioner and his associate agreed that the profits and losses should be determined and delivered monthly and that the proportionate share thereof should be credited or charged to the personal account of each of the two owners on the books of the corporation. Petitioner did not include his share of the profits so credited on the books in his return for the taxable year of crediting. The credits, as here, were unrestricted. Petitioner was a director and treasurer of the corporation. The Tax Court (then the Board of Tax Appeals) held on these facts that (p. 212)

“Under the facts before us we feel that it is apparent that his share of the earnings of the corporation was unqualifiedly subject to the demand of the petitioner from the times in the several years when determined and divided according to the books.”

The Commissioner acquiesced in this case (Acq. IX-2, C.B. 65). Here again there is a finding of control from a crediting in a closely held corporation without a development of specific evidence of control, aside from the offices held by the taxpayer. There was no declaration of a dividend in Towle and apparently no charge to surplus in the amount thereof.

In *Valley Lumber Co. of Lodi*, 43 B.T.A. 423, (1941) the petitioner was a close corporation with eight stockholders, operating on an accrual basis. In 1936 it declared two dividends, one on September 5, the other on December 24, both payable at once. All of the stockholders had accounts on the corporation's books but none was indebted to the corporation. The amounts of the dividends were immediately credited to the stockholders' accounts; the first dividend was withdrawn but the second dividend remained undrawn in the several accounts for the remainder of the year. Six of the stockholders included the entire amount of both dividends in their 1936 income; one included only the September dividend; and one filed no return. The question of constructive payment of the dividend arose with respect to the dividends paid credit. The Tax Court held that the credit was allowable, stating the rule to be as follows: (p. 426)

“When a book credit is unrestricted and thoroughly subject to the demand and control of the shareholder, it is the equivalent of cash and does constitute payment of the dividend for the purpose of the dividends paid credit.”

There is nothing in the record of the *Valley Lumber Co. of Lodi*, *supra*, which indicates that the relationship existing between the stockholders and the corporation was as close as here; or that the stockholders were represented on the board of directors of the declaring corporation, as is true in the instant case; or that the stockholders exercised the day by day control over their corporation which the stockholders of taxpayer exercised in the instant case. The

only finding was that the corporation involved had eight shareholders and was a close corporation. The Commissioner acquiesced in the decision (1941-1 C.B.11).

While purporting to agree with the rule of the foregoing cases (Pet. Br. p. 33), the Commissioner maintains that important elements of constructive receipt are here lacking. He states (Pet. Br. pp. 33, 34) that this court has definitely recognized that a "segregation" must be made in order that a dividend may be regarded as constructively received and that the stockholder must have acquired control over the dividend. He denies that there is any evidence of either a segregation or control. The contention approaches casuistry.

In the case referred to by the Commissioner, *Commissioner v. Scatena*, 85 F. (2d) 729, (C.C.A. 9th, 1936) a dividend was declared in stock of another company. On November 1, 1928, the shares of dividend stock were delivered to the transfer agent of the corporation in whose stock the dividend had been declared. On October 31, 1928, the declaring corporation charged its surplus with the cost of the dividend shares. The date on which the certificates for the dividend shares were delivered was not in the record. Nevertheless this court held that the intention of the declaring corporation was that (p. 729)

"title to the dividends passed at the time of declaration or, at the latest, at the time of delivery of the certificates to the transfer agent."

It recognized the general rule that (p. 731)

"the lawful declaration of a dividend creates a debt from the corporation to the stockholders, and when a segregation is made to the amount of the dividend, the amount thereof is held by the corporation as trustee for the stockholders."

This court did not attempt in the *Scatena* case to define a "segregation". There is ample authority, however, for

the proposition that the mere declaration of a dividend effects the segregation. In *McLaran, Admin. v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 49 (1906) the court stated:

“The doctrine is that by the mere declaration the dividend becomes immediately separated and segregated from the stock and exists independently of it; that the right thereto becomes at once immediately fixed and absolute in the stockholder, and from thenceforth the right of each individual stockholder is changed by the act of declaration from that of partner and part owner of the corporate property to a status absolutely adverse to every other stockholder and to the corporation itself, in so far as his pro rata proportion to the dividend is concerned.”

The Court of Claims states the rule as follows in *Bulger Block Coal Co. v. U. S.*, 48 F. (2d) 675, 678 (Ct. Cls. 1931):

“These cases show that authority is abundant for the proposition that the declaration of a dividend is sufficient by itself and alone to set apart from the profits of the corporation (if the profits are sufficient for that purpose) a sum which is to be paid to stockholders in proportion to their shares.”

The rule is stated as follows in 18 C.J.S. Sec. 463, p. 1104:

“The declaration of a dividend is the act of the corporation in setting apart a portion of its net or surplus profits for distribution among the stockholders according to their respective interests.”

The Tax Court has stated it as follows in *The Gregg Company*, 25 B.T.A. 81, 89 (1932):

“A corporation may declare a dividend whenever it has surplus profits equal to or greater than the amount of the dividend. The fact that it does not have ready cash with which to pay does not render the dividend illegal. *Gilbert Paper Co. v. Prankard*, 198 N. Y. S. 25; *Cox v. Leahy*, 204 N. Y. S.

741. *Upon the declaration of a dividend a corporation becomes the debtor of the stockholder for his proportionate part thereof, and the amount of the dividend is no longer a part of the company's assets. W. E. Caldwell Co., 6 B.T.A. 47; Zenith Milling Co., 8 B.T.A. 1279; affd. 41 Fed. (2d) 905; Georgia Engineering Co., 21 B.T.A. 532.*" (Italics supplied)

Moreover, obviously, the unconditional charge to surplus and credit to the individual stockholders in their proportionate shares of a dividend is a sufficient segregation in a proper case to make the dividend available to stockholders and to support taxation thereon as a dividend distributed in the year of the crediting. *Baker v. U. S.*, 17 F. Supp. 976 (Ct. Cls. 1937); *Jacobus v. U. S.*, 9 F. Supp. 41 (Ct. Cls. 1934); *Hadley v. Commissioner*, 59 App. D. C., 139, 36 F. (2d) 543 (1929); *Brooks v. Commissioner*, 35 F. (2d) 178 (C.C.A. 4th, 1929); *A. D. Saenger, Inc. v. Commissioner* 84 F. (2d) 23 (C.C.A. 5th, 1936), cert. den. 299 U.S. 577. It is the reduction of accumulated earnings or profits by the charge to surplus and the crediting of the amount of the reduction without restriction to the stockholders which in the proper factual frame will effect the distribution.

The case of *Frederick Smith Enterprise Company v. Commissioner*, 167 F. (2d) 356 (C.C.A. 6th, 1948), is cited by the Commissioner (Pet. Br. p. 34) apparently for the proposition that the existence of indebtedness owing by the stockholders to the corporation does not effect a payment of a dividend by way of offset. This case is cited as having been decided by this circuit. It was in fact decided by the Sixth Circuit.

In the first place, this case involves the question of whether a dividend was "paid" within the time delimited by Section 504(c) of the Internal Revenue Code. It had nothing to do with the question of when the dividend reduced earnings and profits of the declaring corporation. In

the second place, the Commissioner has failed to include in his statement of the facts of the case material facts which indicate that the situation is not at all comparable to the instant case. These facts are as follows: (1) the checks in payment of the dividend were issued on March 26, eleven days after the expiration of the period prescribed in section 504 (c) had expired, and were delivered on that date. They were then returned to the company to apply upon the stockholders' accounts. (2) There was no evidence of any agreement between the stockholders and their corporation whereby the indebtedness of the stockholders to the corporation was offset against the dividend obligation of the corporation. (3) No book entries were made reflecting a set-off. Because of these facts the Tax Court had rejected the contention of payment by offset (Tax Court Memo. Op. Docket No. 11158) and the Circuit Court affirmed.

The Commissioner (Pet. Br. p. 33) cites *The Korfund Co., Inc. v. Commissioner*, 1 T.C. 1180 (1943), apparently as being a case which resembles the case at bar and in which constructive receipt was denied. The case is readily distinguishable on its facts. In that case there was a stockholders' agreement "specifically providing against making the dividend subject to their demands except by mutual consent." There was no crediting to the accounts of the stockholders of the amount of the dividend. The dividend had not been charged against surplus of the declaring corporation in the year claimed as the year of constructive receipt. The evidence did not show, and petitioner made no contention, that any of the stockholders reported his proportionate part of the surplus as income from dividends in the year of claimed constructive receipt. It is quite apparent that the *Korfund* case bears no factual resemblance to the instant case.

The Commissioner contends (Pet. Br. p. 34, 35, 37) that no significance should be given to the entry debiting surplus and crediting the individual stockholders proportionately.

He states (Pet. Br. p. 24, 25) that the corresponding credit was to a dividends payable account and that the account still left the dividends unpaid. The Commissioner is in error. The credit (See Exhibit 3-C, R. 152) was to individual stockholders in pro rata amounts under a heading reading "Dividends Payable." The Tax Court found that each stockholder was credited with his proportionate share of the amount declared as a dividend in the Dividends Payable account (R. 25) and that the crediting to the stockholders was sufficient to constitute payment of the dividends (R. 36). While the *Dobson* case has lost the magic of its reviewability holding, it may still be said to indicate that the Tax Court is not nearly as inept at accounting problems as the Commissioner's brief would seem to imply.

A similar contention was made in *Bulger Block Coal Co. v. U.S.*, 48 F. (2d) 675 (Ct. Cls. 1931), in which the Commissioner had excluded from invested capital of a dividend declaring corporation an amount representing the balance of a credit on the books of the corporation of a stockholder's proportionate share of the dividend, the account reading "Dividends Payable—D. J. Kennedy," which is in all material respects similar to the entry which the Commissioner is here attacking. The amount of the credit was \$104,950.00. The taxpayer contested that treatment, contending, *inter alia*, that the bookkeeping entries were insufficient to effect a payment of the dividend. The shoe was on the Commissioner's other foot in that case—he supported the entry there.

The court ruled that the amount of the dividend credit was borrowed capital to be excluded from the declaring corporation's invested capital since the declaration had reduced the surplus of the corporation by creating a liability of the corporation to its stockholders and its use of the funds with which it was required to pay the dividend was a use of borrowed capital.

On the point of the sufficiency of the book entry the court stated (681):

“We think, we have already shown quite conclusively, that the declaration of a dividend is by itself and alone sufficient to set apart the amount thereof to the stockholders, but, if it should be held that some other segregation should be made thereof in order to take the fund out of the surplus account, we think it was done in this case when the amount of the dividend in controversy was, after the declaration of the dividend, carried on plaintiff’s books in an account headed ‘Dividends payable—D. J. Kennedy.’ The plaintiff calls attention to the fact that a portion of the dividend due D. J. Kennedy was credited directly to his personal account. The evidence fails to show why this was done, and we do not think it alters the relation of the parties.”

Assuredly, a book entry, standing alone, may be insufficient to effect a distribution of a dividend; but when that book entry is complete and unreserved and the context in which such entry is made is a closely held corporation whose stockholders actively participated in the conduct of the corporate enterprise and exercised a complete day-by-day control over their corporation in order that their business activities might be meshed and integrated with the activities of the corporation, as the nature of the business of both required, and where the stockholders, without any additional action on the part of the declaring corporation, were able in 1933 to direct the disposition of the dividend, it is clear that the control was in fact present in the fiscal year of declaration. In addition, the action of the controlling stockholder in reporting the receipt of the dividend in the fiscal year of declaration, namely, the fiscal year ended June 30, 1931, is a significant recognition of the complete availability of the dividend in that year.

There is no substance to the Commissioner’s argument here (Pet. Br. pp. 35-36) that the control exercised in 1933

does not evidence the prior existence of such control because the date on the journal entry (May 27, 1933) precedes the date on the letters of authorization from the stockholders, to wit: June 27, 1933. The entry dated May 27, 1933 (R. 154) refers to the letters of authorization of June 27, 1933 as authorizing the entry itself. Obviously, the date of the journal entry is not the day upon which the journal entry was made and at the time of such entry it was based upon and reflected the directions of the stockholders. The control which they exercised in the fiscal year ended June 30, 1933 was the control which they had in the fiscal year ended June 30, 1931. What they did in the fiscal year ended June 30, 1933, they could have done in the fiscal year ended June 30, 1931, and in the intervening fiscal years as well. That they did not do so does not lessen one whit the fact that the dividend was constructively received in the fiscal year ended June 30, 1931 and the Tax Court committed no error in so holding.

The control of the stockholders in the case at bar over Studios, the declaring corporation, was complete and the Tax Court committed no error in finding that the stockholders could have withdrawn the dividend in the fiscal year of declaration and that it was unqualifiedly subject to their command in that year. To say, as petitioner does, (Pet. Br. p. 34), that "under the facts of this case there was no control, as a matter of law." is to evince a lack of regard for the undisputed realities of the case. The case is thoroughly impregnated with the evidence of the control.

II.

Irrespective of the time when the stockholders received the dividend, the declaration of the dividend on September 11, 1930, payable December 15, 1930, created a liability of the corporation and correspondingly reduced the then accumulated earnings or profits, and the Tax Court committed no error in so holding.

This point is moot if the Tax Court's determination that the dividend of September 11, 1930, was under all the circumstances of the case constructively received by the stockholders of the declaring corporation in the fiscal year ended June 30, 1931, thereby correspondingly reducing accumulated earnings and profits in that year.

The parties have stipulated (R. 144-145) that the taxability of the dividend distribution in 1942 depends upon whether the accumulated earnings or profits of Studios were reduced in the fiscal year ended June 30, 1931, or in the fiscal year ended June 30, 1933. The rationale of the Tax Court's opinion on this point is that upon the declaration of the dividend Studios became legally bound in the fiscal year 1931 to pay the declared dividend to its stockholders; that this amount could no longer be listed among its assets but represented an indebtedness; and that surplus was thereby decreased (R. 30-33).

The gist of the Commissioner's contention, as nearly as it can be gleaned from petitioner's brief, is that, because Section 115(a) of the Internal Revenue Code and of the Revenue Act of 1928 defines a dividend as a distribution "out of" accumulated earnings or profits, such earnings or profits could not be reduced until the distribution of the dividend by actual or constructive payment (Pet. Br. p. 19). In other words the Commissioner is contending that Section 115(a) abrogates the general rule that the earnings or profits of a corporation are reduced by the declaration of a dividend.

There is no magic in the term "distribution" as used in Section 115(a) of the Internal Revenue Code or in the Revenue Act of 1928. Such section merely defines the time when and the extent to which a stockholder of a corporation is subject to tax as the result of a corporate distribution. It makes no reference to a reduction of earnings or profits. On the contrary, as will hereinafter be pointed out, Section 115(a) now defines a dividend as a distribution out of current earnings of the taxable year computed as of the close of the year without regard to whether there were earnings or profits at the date of distribution.

Under long established and uniform holdings of the courts, earnings or profits are reduced at the time of the declaration of a dividend. At such time an enforceable debt is created by the corporation to its stockholders in the amount of the dividend and earnings or profits of the corporation are segregated to the extent of the dividend and are appropriated to the stockholders. The ensuing distribution effects no reduction of earnings or profits; it merely constitutes the transfer of the funds which have been appropriated and already withdrawn from earnings or profits. It is a distribution of funds previously taken from earnings or profits and which are "out of" earnings or profits. The Commissioner's conclusion that earnings or profits could not be reduced prior to a distribution because the Internal Revenue Code provides that a dividend is a distribution "out of" accumulated earnings or profits, is a complete *non sequitur*.

The question here involved is not the liability to tax of the stockholders as the result of a declaration of the dividend of September 11, 1930. The question to be determined in accordance with the stipulation of the parties is the narrow question of whether the declaration of such dividend reduced accumulated earnings or profits. Thus, the question is a corporate question and not a stockholder-taxability question and cases like *Tar Products Corp. v. Commissioner* 130 F. (2d) 866 (C.C.A. 3rd, 1942); *Mason v. Rout-*

zahn, 275 U.S. 175, 48 S. Ct. 50 (1927); and *Emily D. Proctor*, 11 B.T.A. 235 (1928), and other cases cited by the Commissioner (Pet. Br. p. 19, 20) which treat of taxability of dividends from the point of view of the individual stockholder, are not germane to the issue here presented.

The fallacy in the Commissioner's arguments will be found in his confusing endeavor to apply rules governing stockholders' income taxability in the solution of what is strictly a corporate problem, namely, when surplus was reduced.

The Commissioner's statement (Pet. Br. p. 19) that it is "the settled rule that it is the distribution or payment of a dividend, and not the declaration, which governs for tax purposes" is erroneous. The date of declaration and not the date of distribution controls where questions of reducing a corporation's invested capital because of a dividend are involved (*The Gregg Company, Ltd.*, 25 B.T.A. 81 (1932); *Belmont Iron Works*, 9 B.T.A. 216 (1927); *W. E. Caldwell Co.*, 6 B.T.A. 47 (1927); or where the status of the amount of a declared dividend as borrowed capital until paid is involved (*Bulger Block Coal Co. v. U.S.* 48 F. (2d) 675 (Ct. Cls. 1931). In speaking of the question of the effect of the declaration of a dividend on the statutory invested capital of the declaring corporation, the Tax Court stated in the *Caldwell* case, *supra*, that that problem "has nothing to do with the time at which the distribution results in income to the distributee, or the rates at which it is taxable to him." (6 B.T.A. at p. 50)

The established rule on the effect of the declaration of a dividend is, as this court has recognized (*Commissioner v. Scatena*, 85 F. (2d) 729, 731) (C.C.A. 9th, 1936), that upon the declaration of a dividend the funds represented by the dividend are separated from the accumulated earnings or profits of the corporation and are appropriated by that action to the stockholders benefited by the declaring resolution who become creditors of the corporation for the amount of the dividend. So far as the dividend itself is

concerned, the relationship of corporation and stockholders has ceased and the relationship of debtor and creditor has been created. It is immaterial that the dividend is made payable at a later date. The rights of the stockholders as creditors are vested immediately upon the declaration of the dividend. The unconditioned title to the money or property actually vests as a matter of law in the stockholders at that time. *Fletcher, Cyc. Corps.* Sec. 5322, p. 786. When such a dividend has once been declared it cannot be rescinded. *Commissioner v. Scatena*, supra, at page 731, *Fletcher Cyc. Corps.*, Sec. 3653, page 6064.

The rule is stated in *U. S. v. Guinzburg*, 278 Fed. 363 (C.C.A. 2nd, 1921): as follows:

“By the declaration of a dividend, the earnings of the company to the extent declared were separated from the property of the corporation, and were appropriated by that action to the then stockholders, who became creditors of the corporation for the amount of the dividend. The relation then created was that of debtor and creditor. *N. Y. Trust Co. et al v. Edwards, Collector*, 257 U.S. 176, 42 Sup. Ct. 68, 66 L. Ed. 186, decided November 21, 1921; *Wheeler v. Northwestern Sleigh Co.* (C.C.) 39 Fed. 347; *People ex rel. U. S. Trust Co. v. Barker*, 86 Hun, 131, 33 N. Y. Supp. 388; *Billingham v. Gleason Mfg. Co.*, 101 App. Div. 476, 91 N.Y. Supp. 1046, affirmed 185 N.Y. 571, 78 N.E. 1099. It is the separation of the earnings from the balance of the corporate property, together with the promise to pay arising from the declaration of the dividend, that works this change. The holder of stock, with respect to the dividend, is on a par with the other creditors of the corporation. *Staats v. Biograph Co.*, 236 Fed. 454, 149 C.C.A. 506, L.R.A. 1917 B, 728. The fact that the dividend is payable at a future date does not alter the rights thus created. The obligation of the corporation as debtor commences with the declaration of the dividend, although the payment is postponed for the convenience of the company. The rights of the stockholders are immediately vested the moment the dividend is

declared. *N. Y. Trust Co. v. Edwards*, supra. The action of the board of directors is the appropriation of a portion of the earnings to the defendant in error as the holder of a certificate of stock.”

The rule that the date of declaration and not the date of payment governs in determining the time when the dividend reduces accumulated earnings or profits is in accord with the principles of accounting. As set forth in *W. A. Paton, Accountants' Handbook*, Third Edition, pages 1041, 1042, the rule is expressed as follows:

“EFFECT OF DECLARATION OF DIVIDENDS.—When a quorum of the board of directors has resolved to appropriate an amount as dividends on a class of stock, and the shareholders of that class have been notified explicitly or constructively, the proportionate amounts applicable to the shares of the several stockholders become contractual debts of the corporation. Recognition should be given the changed relationship indicated by the amount of the dividend by charging current earnings (or a ‘dividend charges’ account which will be closed to current income) or earned surplus and crediting a dividends payable account.

Dewing (*Financial Policy of Corporations*) and Montgomery (*Auditing Theory and Practice*) accept the declaration of the dividend by the board of directors as the act which creates a debt of the corporation to its shareholders.”

The same rule is laid down by the Securities and Exchange Commission in prescribing a uniform system of accounts for commercial and industrial companies and for holding companies. The Commission requires that “dividends declared” be set up as a current liability of the declaring corporation and as a deduction from surplus. Regulations S-X of Securities and Exchange Commission, Art. 5 Rule 5.02, Subdiv. 25, 3 C.C.H. Federal Securities Law Service, par. 69242; and par. 70311.

The Commissioner admits the general rule and that California conforms to it (*Meyers v. El Tejon Oil and Re-*

fining Co., 29 Cal. (2d) 184, 174 P. (2d) 1 (1946); *Smith v. Taecker et al.*, 133 Cal. App. 351, 24 P. (2d) 182 (1933) but states (Pet. Br. p. 22) that such fact "should not be controlling in resolving the federal tax question involved here." The rule as to the corporate reduction of earnings or profits upon the declaration of a dividend is as much a part of federal income taxation as the rule for individual stockholder taxation on corporate distributions. *The Gregg Company, Ltd. v. Commissioner*, supra; *Belmont Iron Works v. Commissioner*, supra; *W. E. Caldwell v. Commissioner*, supra; *Bulger Block Coal Co. v. U. S.*, supra.

The citation of *Faris v. Helvering*, 71 F. (2d) 610 (C.C.A. 9th, 1934), cert. den. 293 U.S. 584, for the proposition that the law of California, which conforms to the general rule on the effect of the declaration of a dividend on corporate surplus, "should not be controlling in resolving the federal tax question involved here" (Pet. Br. p. 22) is wholly misleading. That case did not involve the question as to whether corporate surplus should be reduced at the time of the declaration of a dividend. It merely held that, for the purpose of determining whether an amount paid by a corporation to a stockholder is a dividend or represents capital, "neither the action of the state commissioner of corporations nor of the corporation is decisive of the matter, which is controlled by the Revenue Laws of the United States" (71 S. (2d) at page 611). Taxpayer does not deny the validity of that observation. The *Faris* case is governed by Section 201 (a) and (b) of the Revenue Act of 1921, the predecessor of present Section 115(a) of the Internal Revenue Code. The point involved in the case at bar is not controlled by Section 115(a) of the Internal Revenue Code, or by its predecessor sections.

This court in *Commissioner v. Scatena*, supra, recognized and applied the rule relating to the intra-mural effect of the declaration of a dividend in a case involving a review of a Tax Court determination of a deficiency in federal income tax determined by the Commissioner.

The basic distinction between the question of the reduction of corporate surplus by the declaration of a dividend and the question of the taxability of the stockholders with respect to a corporate distribution is made by the Tax Court in the very case which the Commissioner presses upon this court as involving "the exact question presented in this case." (Pet. Br. p. 26), namely, *Proctor v. Commissioner*, 11 B.T.A. 235 (1928). The Tax Court in the instant case stated that its prior decision in the *Proctor* case had no application to the present case because "we are not concerned with the taxability of the dividend declared on September 11, 1930, in the hands of the stockholders, but only with the effect of that dividend on corporate surplus." (R. 33).

Furthermore, the Tax Court stated that the distinction in issues was recognized in the decision in the *Proctor* case, quoting the following language (R. 33):

"***we think it beside the point that the corporation may for a profit and loss statement or accounting purposes, or as showing the status existing between the corporation and its shareholders, show its earnings and profits to be reduced by a declaration of a dividend not then paid. The dividend declared must give way to the dividend paid *in so far as the taxability of the same in the hands of the stockholders is concerned*. It is to tax that which is first distributed by payment rather than declaration that the statute seeks to and does reach. [Italics supplied]."

The Commissioner is, therefore, clearly in error when he states (Pet. Br. p. 25) that "The majority of the Tax Court in this case, however, declined to follow the *Proctor* case, perhaps because it misunderstood it, since it seemed to regard the *Proctor* case as one of 'those cases' which did not involve 'the effect of the declaration or payment [of a dividend] on the corporation's own financial structure'."

The Commissioner makes the transparently wrong argument that it is unsound and illogical to have one rule for determining when a stockholder is taxable on a dividend and another rule for determining when earnings or profits are reduced and that the tax consequences of a dividend should be the same both as to the corporation and its stockholders (Pet. Br. p. 21). Such differences present nothing either unsound or illogical. One rule is essential to determine stockholders' taxability on corporate distributions and the other to determine the corporate problem when corporate surplus is reduced. Each rule has its value in the separate situations in which it is applicable.

There is no necessary relationship between a corporate distribution and a reduction in earnings or profits. Section 115 (a) of the Internal Revenue Code provides for the taxation of a distribution which is made "out of the earnings or profits of the taxable year * * * without regard to the amount of the earnings and profits at the time the distribution was made." Section 115(b) provides that every distribution is deemed to be made "from the most recently accumulated earnings or profits". Therefore if there are no accumulated earnings or profits and no current earnings at the time of distribution, there is obviously nothing which can be reduced at the time of distribution. If thereafter, and within the same taxable year, earnings or profits are realized, then the reduction must take place at a point of time after the date of distribution. Conversely, there may be a capital deficit at the beginning of the taxable year, earnings or profits at the date of distribution, and a net operating loss thereafter which eliminates the earnings or profits by the close of the taxable year. If the Commissioner's position is right and the distribution reduces the earnings or profits, then the distribution would be a taxable dividend. But since Section 115(a) says that the earnings or profits must be computed at the close of the taxable year without regard to the earnings or profits at the date of distribution, the distribution would not be a taxable dividend.

There is, accordingly, nothing to sustain the Commissioner's argument that the date of distribution is the date at which the earnings or profits of the declaring corporation are reduced. He has mistaken Congress' designation of the sources of corporate funds upon which dividend taxation can be sustained for a legislative abrogation of long-established legal principles which were not involved in the situation upon which Congress was legislating.

The Commissioner attempts to bring to his support the treatment of earnings or profits under Section 115(h) of the Internal Revenue Code (Pet. Br. p. 21). The situation covered by Section 115(h) differs radically from the issue here involved. That section relates to exchanges, and distributions of stock or securities in connection with exchanges, in which gain is realized but is not recognized for the purposes of immediate taxation. The *Bedford, Wheeler* and *Munter* cases cited on page 21 of petitioner's brief add nothing to the discussion here.

In addition, Section 115(h) of the Internal Revenue Code was not inserted in the Revenue Act of 1936 for the purpose of adding a consistency to the law not theretofore present but was enacted for the purpose of greater clarity. The report of the Ways and Means Committee so states specifically.

"While making no change in the rule as applied under existing law, the recommended amendment is desirable in the interests of greater clarity." House Rep. No. 2475, 74th Cong. 2nd Sess.

Irrespective of the time when the stockholders of Studios received the dividend of September 11, 1930, the declaration of that dividend created a liability of the corporation and effected a corresponding reduction of accumulated earnings or profits in the fiscal year ended June 30, 1931, and the Tax Court committed no error in so holding.

CONCLUSION

Respondent respectfully submits that the Tax Court committed no error in its determination that, of the sum of \$800,000.00 distributed to respondent in the taxable year here involved, \$104,610.56 constitutes a distribution of accumulated earnings or profits. The decision of the Tax Court should be affirmed upon either or both of the following premises:

1. The determination of the Tax Court that the dividend of September 11, 1930, was, under all the circumstances of the case, distributed to the stockholders in the fiscal year ended June 30, 1931, and reduced accumulated earnings or profits of the declaring corporation in that year, is a fact determination supported by substantial evidence and is clearly correct.

2. Irrespective of the time when the dividend of September 11, 1930, was distributed, the declaration of that dividend created a liability of the corporation and effected a corresponding reduction in accumulated earnings or profits in the fiscal year ended June 30, 1931, and the Tax Court committed no error in so holding.

Respectfully submitted,

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